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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1985

STATE OF DELAWARE,

Petitioner,

v.

PERCY E. WAINWRIGHT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do *Rhode Island v. Innis* and *Edwards v. Arizona* prohibit the police from explaining to the suspect, during the booking process, the nature of the offense with which he is charged and the factual basis for his arrest?

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PETITION FOR WRIT OF CERTIORARI

The State of Delaware, petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Delaware Supreme Court entered February 21, 1986.

OPINION BELOW

The opinion of the Supreme Court of Delaware is officially reported at 504 A.2d 1096 (Del. 1986). It is reproduced in the Appendix to this Petition beginning at App. 1.

JURISDICTION

The judgment of the Delaware Supreme Court, reversing respondent's convictions for first degree murder and an associated weapons offense, was entered on February 21, 1986. On April 14, 1986, Justice Brennan extended the time in which to file a petition for certiorari to May 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Although the judgment below vacated the convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented. *Florida v. Meyers,* 466 U.S. 380, 381 n.* (1984) (*per curiam*); *California v. Stewart,* 384 U.S. 436, 497, 498 n.71 (1966) (decided with *Miranda v. Arizona*).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution provides "nor shall [any person] be compelled in any criminal case to be a witness against himself."

2. Although not directly involved in the question presented, the following provisions of the Delaware Code were involved in the prosecution and are reproduced beginning at App. 18. Del. Code Ann. tit. 11, §§ 271(2)(b), 636(a)(6), 1447 (1979); Del. Super. Ct. Crim. R. 3, 4(b)(1), 4(c)(3), 5(a)-(b) (1975 & 1984 Supp.).

STATEMENT OF THE CASE

Following a jury trial, respondent, Percy E. Wainwright, was convicted of first degree murder for his participation in the attempted robbery of a liquor store and the killing of the store clerk, William Hastings.[1] On appeal, the Delaware Supreme Court reversed the conviction, deciding that the trial court had, in light of *Edwards v. Arizona*, 451 U.S. 477 (1981), committed plain error when it admitted into evidence a post-arrest statement made by Wainwright. It concluded that because Wainwright had requested counsel in response to the *Miranda* warnings given at the beginning of the booking or processing procedure, the police could not afterwards, as part of the normal booking routine, inform him of the factual basis for his arrest. To the Delaware court, such a disclosure was impermissible "re-interrogation" under *Rhode Island v. Innis*, 446 U.S. 291 (1980) and *Edwards*, which rendered inadmissible Wainwright's subsequent statements, uttered forty-five minutes later, denying any culpable participation in the crime.

The question presented by this petition is what constraints the definition of "interrogation" crafted by this Court in *Innis* imposes on a police policy to disclose to all

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[1] Del. Code Ann. tit. 11, § 636(a)(6) (1979) [App. 18]. Wainwright was also convicted of possessing a deadly weapon, a shotgun, during the murder. Del. Code Ann. tit. 11, § 1447 (1979) [App. 18]. Wainwright's culpability was premised on Delaware's accomplice liability provision. Del. Code Ann. tit. 11, § 271(2)(b) (1979) [App 18]. Wainwright was sentenced to life imprisonment for the murder and to a consecutive 15 year term of imprisonment on the weapon charge.

suspects, during the arrest and booking process, the nature of the offenses for which they are being held and the facts which caused their arrest. Without guidance from this Court on that issue, the police will soon find themselves in the midst of a dilemma under *Miranda v. Arizona*, 384 U.S. 436 (1966) which they cannot win. Some suspects will urge that such disclosures are a prerequisite to establishing a valid waiver under *Miranda*. If the police heed those entreaties, their conduct will soon be attacked by others, such as respondent, who will argue that disclosures are impermissible interrogation. Only this Court can chart the appropriate course for the police to follow.

1. The Hold-Up and Murder

During the evening of November 3, 1980, customers entering Lord's Liquor Store in Bridgeville, Delaware noticed David Dodson, distinctive with his long black hair, green trenchcoat, and floppy hat, pacing nervously in front of the store. Tr. I91 (James); I197-98 (Stuart); II217 (Williamson).[2] Thirty minutes later, an off-duty police officer saw Dodson standing along the roadway 100 yards from the store with a shiny object protruding from beneath his coat. As the officer passed in his car, Dodson crossed the highway and ran across a field. Tr. II221-22 (Morris). On the shoulder of the road where Dodson had been walking lay a shotgun shell. It had been fired from a shotgun which Dodson, accompanied by Wainwright, had obtained a few months earlier in Pasadena, Maryland from

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[2] Although the customers did not know Dodson and could only describe the man they saw, Wainwright at trial admitted that Dodson sought to rob the store that night and killed the store clerk. Tr. II75-82 (Wainwright).

Roger Jeffers, a friend of Wainwright's. Tr. II283-85 (Marvel), II247-56 (Jeffers). At the liquor store, William Hastings, the clerk, lay dead, killed by a point-blank shotgun blast.

The following year, Dodson, who at the time of the murder had been an escapee from a Maryland prison, was recaptured. Charged in the Hastings homicide in October 1981, Dodson was returned to Delaware for trial, arriving on November 11, 1982. During questioning by police, he said that he had been the "lookout" man for the robbery while Wainwright had entered the store.[3] When he, standing outside, heard the shotgun fire, he ran to the nearby truck used by the pair. Wainwright quickly followed him, and the two then returned to Federalsburg, Maryland, where they were living.[4]

After Jeffers confirmed to them that Wainwright knew Dodson, the Delaware State Police obtained, on the basis of Dodson's recitations, a Delaware warrant for Wainwright's arrest. Based on the existence of that warrant, the Maryland State Police, accompanied by a Delaware officer, arrested Wainwright in Baltimore on November 11, 1982. Tr. I4, 13 (Griffith). He was then held in Mary-

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[3] Until this time, the police had no evidence suggesting Wainwright's involvement in the robbery and killing. He was also not a person "known" to the police.

[4] At a separate trial, Dodson was convicted of first degree murder and possession of a deadly weapon and subsequently sentenced to life plus twenty years of imprisonment. His appeal is currently before the Delaware Supreme Court. *Dodson v. State, appeal docketed,* No. 158, 1984 (Del. June 11, 1984).

land under a fugitive warrant issued by a local court. Several days later, Wainwright waived extradition.[5]

2. The Booking

On November 16, 1982, Willard Griffith, a Delaware State Police officer, picked up Wainwright in Maryland and drove him to the local police barracks in Delaware, arriving there around noon. There, he was to be processed or booked prior to being taken before a magistrate for his initial appearance.[6] Tr. I6 (Griffith).

Before beginning the fingerprinting and photographing processes, Griffith read the *Miranda* warnings to Wainwright. In response, Wainwright said he wanted an attorney. Tr. I6-7, 15 (Griffith). As part of the regular processing of suspects, Griffith then told Wainwright that he had been charged with first degree murder for Hastings' death and that the charge had been based on Dodson's statement that Wainwright and he had gone to the liquor

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[5] Consistent with the Uniform Extradition Act (Md. Ann. Code Art. 41, § 28 (1982)), the Maryland fugitive warrant merely recited that Wainwright was wanted for murder in Delaware. Contrary to the recitation of the court below (App. 14 n. 1), in this pre-Governor's warrant situation, the Maryland court, in issuing the fugitive warrant, was not required to give to Wainwright a liturgy of the procedural protections surrounding his extradition. Rather, the duty of that court was merely to determine whether Wainwright was the person wanted under the Delaware warrant. *Id.* § 29. Moreover, when Wainwright waived extradition, the only judicial inquiry necessary was whether he understood that he was foregoing awaiting the issuance of a Governor's warrant. *Id.* § 39.

[6] *See* Del. Super. Ct. Crim. R. 5(a) (App. 20). No magistrate was available at the nearby Justice of the Peace Court until after 1:00 p.m. Tr. 18, 15 (Griffith).

store and Wainwright had shot the clerk. Griffith testified, without contradiction, that his recitation was done only to inform Wainwright and that he always gave that information to suspects. That recital accurately recounted Dodson's narrative and was consistent with the affidavit submitted in support of the application for the arrest warrant. Tr. I8, 16-17, 20-21, 24-26 (Griffith).[7] After completing the processing, Wainwright was given lunch at the barracks, the only police contact with him being that necessary to feed him. Tr. I18 (Griffith).

A few minutes before 1:00 p.m., Griffith, without comment, drove Wainwright to the nearby Justice of the Peace Court. As they entered the courthouse parking lot, Wainwright turned to Griffith and said, "I didn't kill that man, he [Dodson] stabbed me twice." Tr. I8, 18-19 (Griffith). Griffith told Wainwright that, in light of his earlier request for an attorney, he could not talk to him about the

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[7] That recitation was also consistent with Del. Super. Ct. Crim. R. 4(c)(3) (App. 19-20) which requires an arresting officer, if he does not have the warrant in his possession, to "inform the defendant of the offense charged and of the fact that a warrant has been issued." Although the Delaware Supreme Court expressed some skepticism about Griffith's testimony, the record gives no reason to find that the procedure here was not a routine one. First, the trial court at the suppression hearing never suggested that the procedure of informing Wainwright "of the charges pending against him, including the evidence that the State had" was unique. Tr. I28-29. Secondly, trial defense counsel, a public defender with over ten years of experience, never indicated at the suppression hearing that he thought the procedure was extraordinary. When Wainwright questioned the procedure for the first time on appeal, the Delaware Supreme Court refused the prosecution's request that the matter be remanded for a further evidentiary hearing to clarify the issue.

case. Tr. I9, 19, 22-23 (Griffith). Not satisfied with this answer, Wainwright asked if he could retract his earlier request for counsel. Griffith said he would call the prosecutor and attempt to arrange a meeting with a lawyer for Wainwright and the prosecutor. Tr. I9, 28 (Griffith).

As Wainwright watched, Griffith's attempts to contact the prosecutor from the courthouse were unavailing. Tr. I11, 19-20 (Griffith). Griffith then asked Wainwright if he wanted to make a statement at that time. Tr. I20 (Griffith). Wainwright did not ask for an attorney or choose to remain silent. Tr. I10 (Griffith). Instead, he explained to Griffith that on the day of the murder, Dodson and he had been riding in his truck and drinking. Dodson kept saying he wanted to commit a robbery, but Wainwright repeatedly demurred. As they passed through Bridgeville, Dodson ordered him to stop the truck. When Wainwright refused, Dodson stabbed him twice in the chest. Wainwright then stopped the truck, and Dodson, carrying a shotgun, left. Dodson returned a few minutes later, yelling for him "to get out of here." On the trip back to Federalsburg, Dodson told him he had shot Hastings. Tr. I11-13 (Griffith), II40 (Griffith).

3. The Trial

Prior to trial, Wainwright moved to suppress his statement. Accepting Wainwright's proffer that his initial utterance in the parking lot was "spontaneous" and not involved in the suppression motion, Tr. I27 the trial court found that after exercising his right to the presence of a lawyer, Wainwright "wanted to initiate a further conversation and withdraw the exercise of that right and

wanted to make a statement." Tr. I29. Concluding that none of the prior conduct of Griffith caused Wainwright to make that decision, the trial court held his detailed statement admissible. Tr. I29-30.[8]

At trial, Wainwright testified in accord with his post-arrest statement. He repeated that he had waited in his truck down the road while Dodson entered the liquor store only because Dodson had, minutes before, physically assaulted him and stabbed him twice in the chest with a knife, causing blood to flow. Tr. II75-82 (Wainwright).[9] Disbelieving Wainwright's exculpatory statements, the jury found him guilty.[10]

4. The Delaware Supreme Court

The Delaware Supreme Court reversed, holding that the officer's accurate recitation of the basis for Wain-

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8 The prosecutor had referred the court to *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), and argued that the utterance in the parking lot constituted the necessary "suspect-initiated" contact. Defense counsel did not dispute that conclusion. Tr. I27-28.

9 Wainwright never reported the incident. Indeed, he told a friend afterwards that Dodson and he had been involved in a robbery which was supposed to be "easy" but that someone had been killed. Tr. IV115-16 (W. Fischer).

10 At trial, Wainwright testified that he had first met Dodson on the docks of Baltimore in September, 1980. The prosecution presented several witnesses who recounted that Wainwright had, beginning in 1977, frequently visited Dodson at a Maryland prison. Tr. IV107-08 (W. Fischer), IV 119-20 (D. Fischer).

wright's arrest was interrogation under *Innis*.[11] Rejecting Wainwright's trial court concession that his approach to Griffith in the parking lot was spontaneous, the Court concluded that all of Wainwright's statements were barred under *Edwards*. The court ignored the legitimate non-investigatory purpose behind informing suspects of the factual cause for their arrest. Thus, disclosure of such information is always prohibited, at least when the revealed information is highly incriminatory.

REASONS FOR GRANTING THE WRIT

1. The Lower Courts are in Conflict Concerning Whether Actions "Normally Attendant to Arrest and Custody" Constitute Interrogation

In *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), this Court held that the term "interrogation," for purposes of triggering the prophylactic procedural safeguards of *Miranda*, "refers not only to express questioning, but also to any words or actions on the part of the

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[11] In apparent *dicta*, the Delaware court also indicated that even if Griffith's recitation of the basis for Wainwright's arrest was not interrogation, the prosecution had not established a valid *Miranda* waiver for the second statement. That conclusion apparently rested on the notion that because Griffith did not reach the prosecutor to arrange a meeting, Wainwright could not make an intelligent decision to intentionally forego his prior invocation of the right to counsel. That premise, that a suspect may not withdraw a prior request for counsel except in the presence of counsel, has been rejected. *Bradshaw*, 462 U.S. at 1046-47; *Wyrick v. Fields*, 459 U.S. 42, 47 (1983). Thus, if this Court would reverse on the interrogation question, Wainwright's statements would be admissible.

police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Since then, the lower courts have often been confronted with situations, as in the prosecution here, where the police have, during the arrest or booking process, explained to the suspect the nature of the offense for which he was being held and the facts which caused him to be arrested. The courts have struggled to resolve the question whether those words or actions on the part of the police constitute "interrogation" or, instead, fall within the language in *Innis* which appears to craft an exception for conduct "normally attendant to arrest and custody."[12] Their answers have been conflicting.

The view adopted by the Delaware court is that, even assuming the legitimacy of a police policy to furnish such information to all suspects during the arrest process, the question of whether such a disclosure constitutes "interrogation" must be judged on a case-by-case basis. The suppression court must in each case make a *post hoc* evaluation of whether, in light of the content of the disclosure, the police officer should have known that compliance with a general policy of informing suspects of the cause

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[12] Although in this case the disclosure came after Wainwright requested counsel, the issue of what constitutes "interrogation" is not limited to "invocation" situations. *Edwards* and *Innis* clearly preclude "interrogation" after the suspect has requested counsel. But more generally, *Miranda* precludes any "interrogation" prior to the recital of the *Miranda* warnings and a valid waiver by the suspect. 384 U.S. at 444, 467-68. Thus, under the reasoning of the court below, the police officer would have violated *Miranda* if he had made the same disclosure prior to, or as part of, his first recitation of the *Miranda* warnings.

of their arrest would likely elicit an incriminating response. If the officer should have realized that possibility, his disclosure will be considered "interrogation." If, on the other hand, the information which was disclosed was not "highly incriminatory accusations" (App. 14), the officer's conduct will be considered permissible. The Delaware court's view is not unique. In neighboring Maryland, the courts have similarly held that the police "re-interrogate" a suspect who has requested a lawyer if they deliver to him, as seemingly required by a court rule,[13] a copy of the "Statement of Charges" and accompanying probable cause affidavit. *See State v. Quinn,* 498 A.2d 676, 677-78 (Md. Ct. Spec. App. 1985), *cert. denied,* 503 A.2d 253 (Md. 1986); *Conover v. State,* No. 1105, Sept. Term 1985 (Md. Ct. Spec. App. Apr. 2, 1986) (*per curiam*) (App. 22), *petition for cert. filed,* No. 99, Sept. Term 1985 (Md. Apr. 18, 1986).

In effect, this analysis erases the parenthetical phrase out of the *Innis* definition: all police conduct, even that attendant to arrest and custody, must be evaluated as to whether it was reasonably likely to elicit an incriminating response. In practical terms, it requires the arresting police officer to make, in often hurried circumstances, an appraisal whether compliance with a general procedure of disclosing the cause for the arrest will violate *Miranda.* Fully aware that the evidence underlying the arrest was sufficiently accusatory to justify the suspect's detention, he must determine whether the information might or might not prompt the suspect to reply. Even assuming that the officer is competent to make such a difficult decision, *but*

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[13] Md. Rules (Criminal Causes) 4-211, 4-212 (1986).

see Innis, 446 U.S. at 304 (Burger, C.J., concurring), such an *ad hoc* procedure is plainly inconsistent with *Miranda*'s goal of providing clear guidance to the police on the manner in which to conduct a custodial investigation. *Moran v. Burbine,* 106 S.Ct. 1135, 1143 (1986).

Other courts have been unwilling to ignore the fact that *Innis* plainly excepts from the general definition of "interrogation" conduct "normally attendant to arrest and custody." Consistent with this Court's opinion in *South Dakota v. Neville,* 459 U.S. 553, 564 n. 15 (1983), those courts have held that police conduct during arrest, booking, and custody, undertaken to further other legitimate governmental goals, will not be considered "interrogation" even if in any particular case the actions may "reflect a measure of compulsion above and beyond that inherent in custody itself." *Innis,* 446 U.S. at 300.[14] *Cf. New York v. Quarles,* 104 S.Ct. 2626, 2632 (1984) (legitimate interest in public safety justified exception to *Miranda*'s rules); *California v. Byers,* 402 U.S. 424, 448-53 (1970) (Harlan, J., concurring) ("hit and run" self-reporting statute, although it may compel incriminating information in particular case, does not violate the Self-

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[14] In *Neville,* this Court held that a police officer's inquiry to an arrested driver whether he would take a breath test to measure blood alcohol content was not interrogation under *Innis.* In making that determination, this Court did not deny that the inquiry might foreseeably cause incriminating verbal responses and that confronting the driver with the choice whether to submit to the test creates pressures upon the suspect beyond those inherent in his detention. Rather, because the question was a routine one given to all suspects and furthered other legitimate governmental interests, this Court determined that the question fell within the exception for conduct "attendant to arrest and custody."

Incrimination Clause because state's interest in enforcing civil laws justified impairment of some drivers' Fifth Amendment interests). Thus, the Ninth Circuit has held that the police may, without implicating the *Miranda* safeguards, explain to a suspect the nature of the charge and the evidence against him. Because that information may contribute to an intelligent exercise of his judgment or that of his lawyer, the police disclosure is conduct "attendant to arrest and custody." *United States v. Crisco*, 725 F.2d 1228, 1232 (9th Cir.), *cert. denied*, 104 S.Ct. 2360 (1984); *United States v. Thierman*, 678 F.2d 1331, 1334 n. 3 (9th Cir. 1982). *See also United States v. Wilson*, 571 F.2d 455, 456-57 (9th Cir. 1978) (after suspect requested lawyer, police disclosure of new charge filed did not violate *Miranda*); *United States v. Pheaster*, 544 F.2d 353, 366-68 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977) (after suspect said he wanted a lawyer, police review of evidence against him was not "interrogation"); *United States v. Davis*, 527 F.2d 1110, 1111 (9th Cir. 1975), *cert. denied*, 425 U.S. 953 (1976) (police display of bank surveillance photograph to robbery suspect who previously invoked did not violate *Miranda*).[15]

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[15] The Ninth Circuit has approved such disclosures even when it is performed independent of other "booking" procedures. Because in this case the information was disclosed at the same time Wainwright was being photographed and booked, this petition does not present the question of the validity of such police conduct outside the arrest and booking context. When the recital is given at a time when the police are performing other tasks in preparation for taking the suspect for his initial appearance, the disclosure of the basis for his arrest surely does not convey to the suspect the message that he will be held by the police until he gives a statement.

Other jurisdictions, both state and federal, have reached similar conclusions. *See, e.g., United States v. Guido,* 704 F.2d 675, 677-78 (2d Cir. 1983) (no *Edwards* violation where DEA agent during fingerprinting explained to suspect facts which cause his arrest); *United States v. Gordon,* 655 F.2d 478, 485-86 (2d Cir. 1981) (no *Edwards* violation where FBI agent after fingerprinting explained to suspect nature of charge and basis for arrest); *United States v. Rodriguez,* 606 F. Supp. 1363, 1378 (D. Mass. 1985) (no *Miranda* violation where FBI agents gave detailed description of case to suspect before administering warnings); *State v. Williams,* 333 S.E.2d 708, 717 (N.C. 1985) (no *Edwards* violation where officer delivered to suspect, as required by law, search warrant return listing seized incriminating evidence); *People v. McCuaig,* 338 N.W.2d 4, 7 (Mich. App. 1983) (no *Edwards* violation where police described to suspect nature of charge and events that led to his arrest). *See also State v. White,* 460 A.2d 1017, 1020-21 (Me. 1983) (officer's inquiry whether suspect understood charge was "booking" question and not "interrogation"); *State v. Perez,* 422 A.2d 913, 914-16 (R.I. 1980) (disclosure in *Miranda* warnings that suspect was charged with robbery was not interrogation).[16]

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[16] In addition, English practice under the Judges' Rules, which *Miranda* viewed as an appropriate model, 384 U.S. at 486-87, requires that when the suspect is charged by the police he must be given, along with the warnings concerning his right not to answer questions, a statement of the charges lodged against him. The statement must describe in simple language the particulars of the offense. The Judges' Rules, Administrative Directions on Interrogation and the Taking of Statements No. 6(a), Home Office Circular No. 31/1964,

(Continued on following page)

This Court should grant this petition in order to resolve this conflict between the lower courts.

2. The Decision Below Threatens The Legitimate Law Enforcement Interest of Routinely Informing Suspects of the Cause for Their Arrest.

The decision below seemingly holds that the officer's explanation of the basis for Wainwright's arrest had to be considered "interrogation," not conduct "attendant to custody and arrest" because the disclosure of such information is "unnecessary" and "gratituous." App. 14. It thus implies that the police officer can never give the suspect the type of information given to Wainwright, even if the suspect asks for it, absent a waiver. If not questioned, that conclusion will have a substantial impact on law enforcement and criminal justice practices.

Though the Constitution does not compel the states to provide a suspect all the information which might prove helpful to him in intelligently exercising his various procedural rights in the criminal process, *Burbine*, 106 S.Ct. at 1142, criminal justice systems have usually been structured so as to provide suspects, at the earliest practical time, information concerning the reasons for their arrest and detention. Thus, most state criminal procedural codes require the police, acting with or without a warrant, to promptly disclose to the person arrested the nature of the

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reproduced at A Model Code of Pre-Arraignment Procedure, Appendix VI at 655 (1975) [ALI]. Indeed, after the lodging of charges, the Judges' Rules allow the police to bring to the suspect's attention a statement made by the co-defendant so long as nothing is said to invite a reply or comment. The Judges' Rules V, reproduced at Model Code at 653.

offense charged or the cause for his arrest. *See, e.g.*, Del. Super. Ct. Crim. R. 4(c)(3); Cal. Penal Code § 841 (West 1970); Ill. Ann. Stat. ch. 38, § 103-1(a), (b) (Smith-Hurd 1980); Mich. Comp. Laws Ann. §§ 764.18, 764.19 (1982). Moreover, they encourage the authorities, as early as possible, to provide information about the offense and the cause for the arrest beyond rudimentary recitals of the name of the crime. *See United States v. Hodge*, 487 F.2d 945, 946 (5th Cir. 1973) (*per curiam*) (explanation of charges under UCMJ [10 U.S.C. § 831(b)] includes explanation of evidence against suspect). *Cf.* F.R.Crim.P. 5(c) (at initial appearance, suspect to be informed of contents of complaint *and any affidavit* filed to support it); Del. Super. Ct. Crim. R. 5(b) (App. 20-21) (same).[17] Early disclosure of the factual basis for his arrest allows the suspect to accurately assess whether his cooperation with the police may redound to his benefit in the form of release or reduced charges. *See Michigan v. Mosley*, 423 U.S. 96, 109 n. 1 (1975) (White, J., concurring). Moreover, even when the suspect has indicated a desire to have counsel in his contacts with the police, disclosing the evidentiary basis for the arrest to the suspect insures that his counsel will promptly have that information, to use not only in his discussions with his client about the risks or benefits of cooperation, but also in mounting any prompt legal challenge to the arrest or custody.

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[17] Ironically, if the reasoning of the court below here stands, such a disclosure by the magistrate at the initial appearance would constitute impermissible "interrogation." *But see State v. McClain*, 442 N.E.2d 1131, 1131-32 (Ind. App. 1982) (magistrate's explanation of charges at initial appearance, which prompted suspect's statement, not interrogation).

The Delaware court, invoking the name of *Miranda*, suggests that those interests are so insubstantial that the practice of disclosing the evidentiary basis for an arrest should be abandoned. This petition should be granted to correct that mistaken notion.

3. The Decision Below Places The Police in A Dilemma Concerning Disclosure of Information

Finally, unless this petition is granted, the police may soon find themselves in a dilemma concerning the disclosure of information about the cause for arrest and the strictures of *Miranda*. If the police choose not to provide any or only minimal information to the suspect at the time of the arrest, defendants will argue that their subsequent statements are inadmissible because the absence of information concerning the nature of the crime or investigation made their *Miranda* waivers unintelligent. *See, e.g., People v. Spring*, 713 P.2d 865, 871-75 (Colo. 1985), *cert. granted*, 54 U.S.L.W. 3738 (U.S. May 5, 1986) (No. 85-1517); *Carter v. Garrison*, 656 F.2d 68, 70 (4th Cir. 1981), *cert. denied*, 455 U.S. 952 (1982); *United States v. McCrary*, 643 F.2d 323, 328-29 (5th Cir. 1981). If, in response to those challenges, the police choose to make full disclosure, they will, as here, find that their conduct is classified as impermissible "interrogation." In *Spring*, this Court will announce what information about the nature of the offense the police *must* provide. By granting review in this case, this Court can give the lower courts and the police clear guidance concerning what information about the offense the authorities *may* provide.

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CONCLUSION

For the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 21, 1986

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PERCY EWELL WAINWRIGHT, Defendant Below, Appellant,	)	No. 365, 1983
v.	)	Court Below: Superior Court of the State of Delaware in and for Sussex County
STATE OF DELAWARE, Plaintiff Below, Appellee,	)	Cr.A. Nos. S82-11-0061, 1061 and 2061

Submitted: October 29, 1985

Decided: February 21, 1986

Before CHRISTIE, Chief Justice, McNEILLY, HORSEY, MOORE and WALSH, Justices, constituting the Court *en banc.*

Upon appeal from Superior Court. REVERSED and REMANDED for a New Trial.

Nancy Jane Mullen, Esquire, Assistant Public Defender, Wilmington. Attorney for Appellant.

Gary A. Myers, Esquire, Deputy Attorney General, Department of Justice, Georgetown. Attorney for Appellee.

WALSH, Justice:

The defendant, Percy Ewell Wainwright, was convicted following a jury trial in Sussex County of first degree felony murder, 11 *Del. C.* § 636(a)(6), and possession of a deadly weapon during the commission of a felony. The State declined, during trial, to seek the death

penalty, and the defendant was sentenced to life imprisonment without probation or parole on the murder charge with a consecutive fifteen year sentence on the weapons charge. The charges stemmed from his participation in the November 3, 1980, attempted robbery of a Bridgeville liquor store and the killing of a store clerk. A codefendant, David Wayne Dodson, was convicted of the same offenses in a separate trial and sentenced to life imprisonment after a jury declined to impose the death penalty.

Although the defendant assigns a number of errors alleged to have occurred at the trial level, we focus on but one. He argues that certain oral statements were obtained by the police in violation of his Fifth Amendment right to counsel under *Miranda v. Arizona,* 384 U.S. 436 (1966). Since we conclude that it was plain error to deny suppression of such statements we must reverse and remand for a new trial.

I

The factual record underlying the admissibility of the disputed statements is drawn from the suppression hearing at which the only witness was Detective Griffith of the Delaware State Police. The defendant did not testify at the suppression hearing.

There were no eyewitnesses to the shooting of the liquor store clerk, and no identifiable fingerprints were recovered from the scene of the crime. However, police investigation led to the arrest of David Dodson on November 11, 1982, for the murder. Dodson told the police that he and the defendant were present at the time the clerk was shot, but that the defendant went into the liquor store

to rob it and shot the clerk while Dodson remained outside. Based on Dodson's statement, a fugitive warrant was issued and the defendant was arrested at his residence in Maryland on the same day. Detective Griffith accompanied a Maryland State Police detective when the warrant was executed. The Maryland officer read the defendant his *Miranda* rights and advised Wainwright about the warrant on file in Delaware for first degree murder but the defendant declined to give a statement to Griffith.

The defendant waived extradition and was brought back to Delaware on November 16, 1982. On the morning of November 16, when Detectives Griffith and Lee of the Delaware State Police went to Anne Arundel County Prison to pick up the defendant and transport him to Delaware, the Delaware detectives did not read the *Miranda* rights to the defendant. The detectives simply transported the defendant in silence to the Delaware State Police Barracks in Georgetown.

Upon arrival at the Barracks in Georgetown, the defendant was first taken to the Troop Commander's Office where he was advised "why he was brought back to Delaware and what he was being charged with." Detective Griffith read the *Miranda* rights to the defendant from a card issued to the state police. In response, the defendant stated that he would like to have an attorney present. At that point, Detective Griffith stopped questioning the defendant and took him to the processing room. Detective Griffith testified that before the defendant was taken to the processing room, however, he advised the defendant that he was being charged with "murder one of Mr. William Hastings at Bridgeville, Delaware," and that the rea-

son he was being charged was that codefendant David Wayne Dodson had given a complete statement describing how he and Wainwright had gone to Lord's Package Store where Wainwright shot Hastings. Detective Griffith described the exchange as follows:

Q. And you told him the substance of what David Dodson had said?

A. Yes, sir.

Q. What was that?

A. That Mr. Dodson had admitted going to the package store with Mr. Wainwright, but in his statement he had stated that he had been going to stay outside the package store while Mr. Wainwright had gone in, and Mr. Wainwright had been the one that went inside the package store and committed the murder.

Q. So within five or ten minutes after this man said he wanted an attorney, you were telling him what David Dodson had said?

A. I was advising him why he was brought back to Delaware and what he was being charged with.

Q. And you were telling him the substance of the statement that the police got from Dodson?

A. Yes, sir.

Q. What was his response to this?

A. There was no response.

After fingerprinting, the defendant was given lunch and placed in a cell. No conversation took place during lunch. At about 1:00 p.m., Detective Griffith took the defendant to the Magistrate Court, located approximately three hundred yards from the police station. Detective Griffith testified that as he pulled up to the Magistrate

Court the defendant turned to him and said: "I didn't kill that man, he stabbed me twice." At that point, Griffith advised the defendant that since he had elected to have counsel, the detective could not talk to him about the case. The defendant then asked Griffith if he could retract his request for counsel, and Griffith told the defendant that he would call the "District Attorney" and have a defense attorney present, and then the defendant could tell his story. Griffith next told the defendant that if he had not pulled the trigger and killed the man, he might be held as a material witness.

Detective Griffith unsuccessfully attempted to reach a deputy attorney general but did not attempt to reach a defense attorney. Immediately after talking with the deputy attorney general's secretary, Detective Griffith asked the defendant whether he wanted to make a statement or tell the detective what happened. The defendant then made a statement in which he confessed to driving his pickup truck through Bridgeville on the night of the murder, but maintained that Dodson stabbed him after he refused to stop the truck. The defendant finally stopped the truck, and Dodson got out of the truck with a twelve-gauge shotgun. Wainwright waited and a short time later Dodson returned and told the defendant to "get out of here."

At the suppression hearing, defense counsel did not contest the admissibility of the first statement made by the defendant. Defense counsel conceded that "[c]ertainly the officer cannot be expected to control spontaneous statements." Instead, defense counsel challenged the ad-

missibility of the defendant's second statement as a violation of the defendant's right to counsel under *Miranda.*

At the suppression hearing the prosecutor, citing *Oregon v. Bradshaw,* — U.S. —, 103 S.Ct. 2830 (1983) argued that the defendant's statement as he arrived at the Magistrate Court was, itself, initiation of further communication with the police, and the defendant's subsequent statement that "I don't want an attorney now" was a valid waiver of his right to counsel under *Miranda,* after which he willingly gave a statement. Defense counsel did not effectively rebut this argument, and the trial judge, after a recitation of the facts as he understood them, concluded that:

> The only thing that the State has to show is that the defendant was warned of his constitutional rights, that he understood them, and that he waived them. It is clear that he understood them from the fact that he exercised them the first time, and it is further clear that he wanted to waive them by the fact that he asked to waive them.
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> In this particular case, it is clear that he understood them and that he exercised them, and according to the testimony of Officer Griffith, he wanted to initiate a further conversation and withdraw the exercise of that right and wanted to make a statement. . . . I cannot say that giving him lunch, informing him of the evidence, and bringing him to the Justice of the Peace Court was such overbearing tactics by the police that he was not exercising in (sic) free will. . . .

Because defendant's trial counsel conceded that the defendant's first statement was spontaneous, the trial judge focused only on the waiver aspect of the question of admissibility and ruled, in effect, that defendant's desire to

waive his previously invoked right to counsel was established by his own words.

II

As a threshold consideration we must confront the question of whether the scope of our review may extend to claimed error which was not raised at the trial level. Indeed, the State contends that the concession of partial admissibility by defense counsel not only misled the trial court but now requires this Court to rule upon a question not fairly raised on the trial record.

This Court, in the exercise of its appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision. Supreme Court Rule 8; *Jenkins v. State,* Del. Supr., 305 A.2d 610 (1973). On evidentiary issues, the general rule is that evidentiary questions may not be raised for the first time on appeal. *Stevenson v. Henning,* Del. Supr., 268 A.2d 872 (1970). Thus, failure to object to the admissibility of evidence in the trial court may preclude a party from raising the objection for the first time on appeal. *See Young v. State,* Del. Supr., 431 A.2d 1252 (1980); *Rochester v. Katalan,* Del. Supr., 320 A.2d 704 (1974); Del. R. Evid. 103.

To expedite finality and promote economy in litigation, Rule 103 of the Delaware Rules of Evidence requires the parties to raise timely objections to evidence in the trial court or risk losing the right to raise evidentiary issues on appeal. Failure to make an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain. *Goddard v. State,*

Del. Supr., 382 A.2d 238 (1977). Rule 103 allows the appellate court to take notice of "plain errors affecting substantial rights" of the parties on appeal, even though the error was not brought to the attention of the trial court. *See* Del. R. Evid. 103(d).

Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *Dutton v. State,* Del. Supr., 452 A.2d 127, 146 (1982). Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice. *Brownwell v. State,* Del. Supr., 427 A.2d 884, 893 n. 12. Recently, claims of error implicating basic constitutional rights of a defendant have been accorded review by this Court notwithstanding their nonassertion at trial. *Deputy v. State,* Del. Supr., 500 A.2d 581, 589 (1985); *Flamer v. State,* Del. Supr., 490 A.2d 104, 112 (1983).

The significance of the trial judge's ruling on the admissibility of the defendant's statements to Detective Griffith is obvious. Except for these statements, the State's evidence against Wainwright was essentially circumstantial, since Dodson, called as a witness by the defense, refused to testify on grounds of self-incrimination. It is equally clear that the question of the admissibility of Wainwright's statements was one of constitutional dimension. The U.S. Supreme Court's recent decisions in *Edwards v. Arizona,* 451 U.S. 471 (1981) and *Oregon v.*

Bradshaw, — U.S. —, 103 S.Ct. 2830 (1983) make it clear that once an accused has exercised his right to remain silent under *Miranda,* the determination of whether subsequent statements are admissible is based on a two-part test. For such statements to be admissible, the prosecution must establish that the accused initiated further contact with the police, and validly waived his previously invoked right to counsel. The first part of the *Edwards* test — the initiation of further communication by the accused — must be considered before proceeding to decide whether there was a valid waiver. *Edwards,* 451 U.S. at 485; *Bradshaw,* 103 S.Ct. at 2834.

In this case, defense counsel's concession that the defendant's first statement was "spontaneous" probably caused the trial judge to focus only upon the "waiver" part of the *Edwards* test. Although the prosecutor, in arguing for the admissibility of the statements, properly noted that the *Bradshaw* decision discussed the importance of determining which party initiated further conversation after the accused had invoked his right to counsel, the trial judge ruled that "[t]he only thing that the State has to show is that the defendant was warned of his constitutional rights, that he understood them, and that he waived them." Since this statement reflects an incomplete analysis of the proper test to determine whether both of the defendant's statements should have been admitted into evidence, this error is clearly prejudicial to substantial constitutional rights of the defendant and jeopardized the fairness of the trial process. Where there is plain error, the fact that the error may have been "invited" by the actions of defense counsel does not render it less significant or result in a forfeiture of appellate review.

See State v. Harper, N.J. Super. App. Div., 319 A.2d 771, *cert. denied,* 65 N.J. 574, 325 A.2d 708 (1974); *cert. denied,* 68 N.J. 284, 344 A.2d 318 (1975).

III

Our review of the record requires that we examine the evidence presented by the State at the suppression hearing in the light of the State's heavy burden of demonstrating the voluntary relinquishment by a defendant of his previously asserted request for counsel. We begin with the language of *Miranda:*

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.
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> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda, 384 U.S. at 473-75.

In *Edwards* the Supreme Court established a bright-line rule for determining compliance with *Miranda.* This rule was further clarified in *Smith v. Illinois,* — U.S. —, 105 S.Ct. 490 (1984). In *Edwards,* the court established a "rigid prophylactic rule" that once an accused in custody expresses a desire to deal with the police only through counsel, he "is not subject to further interroga-

tion by the authorities until counsel has been made available to him" unless there is a valid waiver of his request for counsel. *Edwards,* 451 U.S. at 485-86; *Smith,* 105 S.Ct. at 492. In *Edwards* and *Smith* the Supreme Court clearly outlined the analysis which this bright-line rule establishes.

> First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

Smith, 105 S.Ct. at 493. The purpose of the *Edwards* rule is to prevent police badgering or overreaching in an effort to wear down the accused despite his request for counsel. *Smith,* 105 S.Ct. at 494.

The *Edwards* standard has not proved to be easy in application and, as the divergence of opinions in *Bradshaw* attest, is open to varying interpretations. The plurality in *Bradshaw* confirmed *Edwards* as holding that once the right to counsel has been asserted by an accused, no further interrogation should take place "unless the accused himself initiates further communications." 103 S.Ct. at 2834. Justice Powell, in a concurring opinion, opined that the only new element in *Edwards* was the emphasis on the prosecution's burden of proof where "the critical question of waiver focuses on whether the initial communication by the police was proper." 103 S.Ct. at 2838 n. 2.

In his dissenting opinion in *Bradshaw,* Justice Marshall claimed that eight Justices of the Court "manifestly agree" that *Edwards* created a *per se* rule.

* * *

> The rule is simply stated: unless the accused himself initiates further communication with the police, a valid waiver of the right to counsel cannot be established. If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver under *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The *only* dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for purposes of *Edwards' per se* rule.

103 S.Ct. at 2840 n.2.

Whatever nuances may lurk in *Edwards,* as interpreted by *Bradshaw,* for present purposes the controlling principle is clear: If the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver. Here it is not disputed that Wainwright actually invoked his right to counsel and thus activated the requirement that the State prove that his later incriminatory statements were the result of discussions initiated by him and were the product of a knowing and intelligent waiver of his rights under the Fifth Amendment. Wainwright's contention that Detective Griffith initiated the discussion which led to the statements, if supported by the record, would, of course, preclude application of the initiation prong of *Edwards* and foreclose the State from discharging its burden of proof on the overall issue of waiver. We turn then to the question of whether the conduct of the police in this case amounted to "initiation" within the meaning of *Edwards.*

IV

Defendant argues that Detective Griffith's comments regarding the nature of the charge and his recitation of the substance of Dodson's statement implicating Wainwright constituted initiation of further conversation by the officer, after Wainwright has asserted his right to counsel. The State maintains that Detective Griffith's comments were mere amplification of the charges made incident to the routine booking procedure. The State points to the fact that the defendant's initial incriminating statement was not made in direct response to Detective Griffith's comments but occurred "spontaneously" approximately forty-five minutes after the defendant had been given lunch, awaiting the opening of the Magistrate's Court.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Court held that "interrogation" under *Miranda* need not amount to actual questioning and may instead be the "functional equivalent" of such questioning. The Court defined the latter to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 302.

The State's argument that Detective Griffith's recital of what Dodson had earlier told police concerning Wainwright's participation in the liquor store robbery was a normal part of the booking processing ignores what had already occurred up to that point. Wainwright had been arrested in Maryland six days earlier on the strength of a fugitive warrant. At the time of his arrest in Maryland,

Wainwright, in Detective Griffith's presence, had been advised generally of the charges against him and had been read his *Miranda* rights. Presumably at the time of his court appearance to waive extradition, the defendant was again advised of the charges awaiting him in Delaware.[1]

Upon his arrival in Delaware the defendant was hardly in ignorance of why he was being processed. Notwithstanding the defendant's generalized knowledge of the charges against him, however, it was clearly appropriate for Detective Griffith to complete the formalities of the booking process including, again, advising the defendant of the charges against him before taking him to the nearest available Justice of the Peace for his initial appearance as required by 11 *Del. C.* § 1909 and Superior Court Rule 5(a). In going beyond the formalities of the booking process to describe the State's evidence, particularly the highly incriminatory accusations of Dodson, Detective Griffith engaged in a gratuitous and totally unnecessary

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[1]In Maryland, under the Uniform Criminal Extradition Act, after arrest the accused must be taken before a judge of a court of record who is required to inform the accused of the demand made for his surrender and the crime with which he is charged, and that the accused has the right to demand and procure legal counsel; and if the accused states that he desires to test the legality of his arrest, the judge must fix a reasonable time within which the accused can apply for a writ of habeas corpus. Md. Ann. Code art. 41 §§ 1 *et seq.* (1982). The accused may waive the issuance and service of the Governor's warrant for the arrest and all other procedure incidental to extradition proceedings by executing a writing in the presence of a judge which states that the accused consents to return to the demanding state. The judge must, however, inform the accused of his rights to the issuance and service of a warrant of extradition and of his right to obtain a writ of habeas corpus. *Id.* at § 39.

tactic which was reasonably calculated to elicit a reaction from the defendant.

The fact that Wainwright's elicited reaction came not immediately but forty-five minutes later when taken from his cell to the magistrate court does not sanitize it. The response made: "I didn't kill him, he stabbed me twice" was understood by Detective Griffith to be a denial of the killing but also a claim by Wainwright that Dodson had stabbed Wainwright. Clearly Wainwright's statement was directly responsive to Dodson's claim, as recited by Detective Griffith, that Wainwright had been the triggerman while Dodson had remained outside. Even though the statement tended to be exculpatory, in fact it was highly inculpatory because it placed Wainwright at the scene and thus corroborated Dodson's statement to that effect.

Nor does the fact that the defendant's statement was made after he was placed alone in a cell render it a purely spontaneous one. Indeed, the opportunity to mull over the effect of Dodson's accusatory statements could reasonably have had the opposite effect—to impress upon the defendant the seriousness of his predicament and the need to rebut his codefendant's accusations. Any attempt to "spark" the accused's initiative to make a statement in the absence of counsel through presentation of evidence will contaminate the waiver. *Bryant v. State*, Md. Ct. Spec. App., 49 Md. App. 272, 431 A.2d 714, 718 (1981), *cert. denied*, 291 Md. 772 (1981); *cert. denied*, 456 U.S. 949 (1982); *see also State v. Quinn*, Md. App., 498 A.2d 676 (1985).

In sum, we conclude that the defendant's initial statement to Detective Griffith made outside the Magistrate's

Court was an elicited response to a statement made by a policeman which was reasonably likely to produce such a response. Since the defendant's elicited statement followed his request for the assistance of counsel, its admission into evidence is barred under the evolving standards of *Edwards* and *Bradshaw*.

Having determined that defendant's initial incriminatory statement was neither spontaneous nor volunteered it is unnecessary to determine whether his further statements, made after Detective Griffith reminded the defendant that he had asked for an attorney and the defendant's subsequent indication of a desire to retract his request are admissible. If, as clearly appears, the defendant's discussion of the incident was prompted by police initiation, subsequent waiver by defendant in the same continuing dialogue is also tainted. Moreover, even if defendant's second statement be viewed separately it was made only after Detective Griffith led the defendant to believe that he would contact an attorney who could be present before the defendant resumed his statement. Detective Griffith conceded that his effort to secure an attorney for the defendant was limited to a phone call to the office of the Deputy Attorney General. When he was unable to make contact with the prosecutor, the officer made no further effort to contact defense counsel and never made any effort at direct contact with the Office of the Public Defender. Thus we need not decide whether the subsequent statement by the defendant was the result of a fresh waiver made after a good faith, but unsuccessful, effort to provide the defendant with counsel. Even if the second statement is separately evaluated, it does not gain admissibility under the existing standards of "strong proof of the valid-

ity of that waiver." *See North Carolina v. Butler,* 441 U.S. 369, 374 (1979).

V

Because we conclude that the defendant's statements to Detective Griffith are rendered inadmissible by reason of the violations of his right to counsel under the Fifth Amendment, we decline to address his claim that his Sixth Amendment right to counsel is equally implicated. We need not, and do not, decide whether the proceedings against the defendant had reached the critical stage in the adversary process where the right to counsel was mandated in any event. *See Deputy,* 500 A.2d at 590. We note, however, that even though the defendant's statements were made immediately preceding his initial appearance before a magistrate in Delaware, he had, as part of the extradition process apparently appeared before the District Court in Maryland earlier that day. Moreover, if defendant's statements fail to gain admissibility under the standards which control his right to counsel under the Fifth Amendment, *a fortiori,* it is difficult to see how the State could meet the more exacting standards for admissibility which govern waiver of the Sixth Amendment right to counsel. *See Massiah v. United States,* 377 U.S. 201 (1964).

* * * *

The conviction is REVERSED and the case is REMANDED for a new trial.

RELEVANT DELAWARE STATUTORY PROVISIONS

Del. Code Ann. tit. 11, sec. 271 (1979). Liability for the conduct of another—Generally.

A person is guilty of an offense committed by another person when:

. . . .

(2) Intending to promote or facilitate the commission of the offense he:

. . . .

b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it.

Del. Code Ann. tit. 11, sec. 636 (1979). Murder in the first degree.

(a) A person is guilty of murder in the first degree when:

(6) He, with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of rape, kidnapping, arson in the first degree, robbery in the first degree, or immediate flight therefrom.

Del. Code Ann. tit. 11, sec. 1447 (1979). Possession of a deadly weapon during the commission of a felony.

(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.

Rule 3, Delaware Superior Court Rules of Criminal Procedure. Commencement and Complaint.

Proceedings may be instituted by indictment (except where otherwise provided by the Constitution of

this State), by complaint, or by arrest where arrest is permissible without a warrant.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a committing magistrate or any other person authorized by law to issue a warrant. The complaint may be made upon personal knowledge or upon reasonable information and belief.

Rule 4, Delaware Superior Court Rules of Criminal Procedure. Warrant or Summons Upon Complaint.

. . . .

(b) Form.

(1) Warrant. The warrant shall be signed by the committing magistrate or other person authorized by law to issue a warrant and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint but need not set out all the elements of the offense. It shall command that the defendant be arrested and brought before the nearest available Justice of the Peace of the county in which the offense is alleged to have been committed, unless the warrant is signed by a person other than a Justice of the Peace, in which case the warrant may command that the defendant be arrested and brought before the committing magistrate or court out of which the warrant was issued. A copy of the complaint shall be attached to the warrant.

(c) Execution or Service and Return.

. . . .

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not

have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

Rule 5, Delaware Superior Court Rules of Criminal Procedure. Initial Appearance Before the Committing Magistrate.

(a) Initial Appearance. An officer making an arrest with or without a warrant or any other authorized peace officer shall take the arrested person without unreasonable delay before either the nearest available Justice of the Peace of the county in which the offense is alleged to have been committed, or before a Justice of the Peace previously designated by the Chief Justice of the Delaware Supreme Court, or a judge of the Municipal Court for the City of Wilmington, or the court out of which the warrant issued in accordance with the command of the warrant. When an arrest is made without a warrant, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause.

(b) Statement by the Committing Magistrate. The defendant shall not be called upon to plead. The committing magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The committing magistrate shall also in-

form the defendant of his right to a preliminary hearing. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

. . . .

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1105

September Term, 1985

CHRISTOPHER HOLMES CONOVER

V.

STATE OF MARYLAND

Bloom
Karwacki
Wenner,
JJ.

———o———

PER CURIAM

———o———

Filed: April 2, 1986

On May 23, 1985, a jury in the Circuit Court for Baltimore County convicted appellant, Christopher Holmes Conover, of two counts of murder, one count of attempted murder, and one count each of assault with intent to murder, burglary, and use of a handgun in the commission of a crime of violence. The court sentenced him to two consecutive life terms for the murders, one concurrent life term for the attempted murder, thirty years concurrent for the aggravated assault, twenty years concurrent for the burglary, and ten years consecutive for the handgun violation. Conover filed a timely appeal.

During the trial, Linda Jordan testified that appellant and another white male knocked on her door and identified

themselves as police. Once inside, the two men drew guns, handcuffed Mrs. Jordan, her husband, and Lisa Brown, Mrs. Jordan's daughter. The victims were forced to lie on the floor. The two men ransacked the house and then admitted a black male named Jones. Jones held a gun on the victims and stuffed gags into their mouths. Shortly thereafter Mrs. Jordan heard gunshots and saw that her daughter had been shot. Mrs. Jordan then saw Jones shoot Mr. Jordan in the back of the head. Jones then fired two shots into the back of Mrs. Jordan's head.

The perpetrators left and then, realizing that Mrs. Jordan was still alive, fired several shots through the sliding glass doors at the rear of her house, hitting her in the leg. Mrs. Jordan survived and managed to summon the police.

The State introduced a microscopic analysis which matched hair fibers found on Lisa Brown's body with appellant's hair. Appellant produced three witnesses who testified that he was attending a party about two miles away at about the time the crimes were committed.

Appellant presents four arguments: first, that the court erred in denying appellant's motion to suppress a statement made to the police; second, that the court erred in instructing the jury; third, that the court erroneously admitted hearsay evidence at appellant's sentencing hearing; and fourth, that the court erred in imposing more than one mandatory sentence without parole. We address the issues *in seriatim*.

I. Motion to Suppress

The record reflects that appellant was properly arrested and read his rights consistent with the directives of *Miranda v. Arizona*, 384 U.S. 436 (1966). At police headquarters appellant was again read his *Miranda* rights and was then interviewed by Detective Long, another detective, and an agent from the Federal Bureau of Investigation. Appellant immediately requested an attorney, at which time Detective Long ceased asking questions.

At trial, Detective Long testified that after appellant's request he told appellant an attorney would be provided. Appellant was not asked any more questions. Instead, the detectives "reviewed" with appellant the charging documents filed against him. These documents were part of a "packet" which included the application for the charging document. The application described much of the evidence against appellant and stated that a .38 caliber pistol had been used in the shootings.

After reviewing this information, appellant, according to Detective Long, began speaking in hypotheticals and asking questions described by Detective Long as "suppose this, suppose that, what if?" Appellant then, apparently without prompting, suddenly stated, "You can't put me with that .38." The entire interview lasted about fifteen minutes. The court refused to suppress the statement, and the State introduced it and referred to it in argument.

Appellant now argues that once he requested an attorney all interrogation should have stopped. He insists that the "review" of the charging documents and evidence constituted continued interrogation and that admission of

statements made thereafter was prejudicial and reversible error. We agree.

On cross-examination, appellant's attorney elicited from Detective Long the details of the "review" of the charging documents. The relevant points are as follows:

(a) Detective Long testified that the documents were read to appellant and then handed to him. Detective Long said he reviewed the documents with appellant by "[h]anding him a charging document and telling him why he's there, why he's being arrested, what he's being arrested for and here is [sic] the charging documents used against you. Read them, look at them, if you have any questions ask them."

(b) The following colloquy occurred between defense counsel and Detective Long:

Q. It seemed to me that during the course of your direct examination you had said that after the Miranda warnings were given he started talking, is that correct, immediately?

A. He just started talking, yes.

Q. He just started talking. Did anybody suggest anything to him about what the evidence was against him?

A. No.

Q. Nobody said that there had been a positive ID made on you and your brother and that there was a .38 clip found in the apartment?

A. The only evidence that was presented to him at the time was the evidence that was stated in the probable cause and for the application for the statement of charges.

Q. Well, you had that at that point, didn't you?

A. Yes. We had the charging document itself so he would have the whole packet, which he could have reviewed.

Q. But that wasn't suggested to him?

A. No, sir.

(c) Finally, the court asked, "Did you [Detective Long] make any statement at all after he [appellant] said he wanted a lawyer to prompt him to make any more comments?" "No, sir, Your Honor" was the answer.

The question we must now answer is whether this "review" of the charging documents amounted to an interrogation in violation of appellant's rights. We need not belabor that question, for one almost identical to it was answered quite recently in *State v. Quinn*, 64 Md. App. 668 (1985). In that case, the investigating officer gave the defendant a copy of the "Statement of Charges" which included an application for the statement of charges, a form from the district court. Chief Judge Gilbert settled the matter presented in *Quinn* and here when he wrote for the court:

> When the trooper handed the application to Quinn [defendant below] to read, it was the same as if he had said to Quinn, "Look and see for yourself what I have against you. Now what do you have to say"? We believe . . . that the trooper's actions were deliberately designed to circumvent *Miranda* and *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)]. What the trooper did was innovative; it was also impermissible. We repeat what we said in *Bryant* [*v. State*, 49 Md. App. 272, *cert. denied*, 291 Md. 772 (1981), *cert. denied*, 456 U.S. 949 (1982)]:

> "[O]nce the right to the presence of counsel has been made by the accused, arrestee, or suspect, any attempt by the authorities to 'spark' the accused's 'own initiative' will contaminate the waiver and render it a nullity."

49 Md. App. at 280, 431 A.2d at 718.

There are no "short cuts" to *Miranda* compliance. *Id.* at 674. We see no difference between *Quinn* and the case *sub judice*, and we accordingly hold that the police violated appellant's rights under *Miranda* by presenting him with the charging documents, including the application for the statement of charges, after he had requested an attorney. The statement elicited thereby was thus inadmissible and should have been suppressed.

We also hold that the error was prejudicial and thus requires reversal. The standard of review applicable here was set forth in *Dorsey v. State* wherein the Court of Appeals said that "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error *in no way* influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated." 276 Md. 638, 659 (1976) (emphasis added).

We cannot say, beyond a reasonable doubt, that the appellant's outburst that "[y]ou can't put me with that .38" in no way influenced the jury. While there was unquestionably a great deal of evidence against appellant, there was not so much as to overwhelm the impact of the statement or render it insignificant. It is true that Mrs. Jordan identified appellant as one of the assailants. It is also true that three unimpeached witnesses placed him at a party almost two miles away. It is true that a micro-

scopic test of hair fibers found on Lisa Brown's body matched appellant's own hair, yet the analyst admitted that such comparisons, while good, are not as reliable or conclusive as fingerprints.

Finally, if the statement was not prejudicial, as the State contends, why, we ask, was it even used? We are hard pressed to believe that the State would fight an objection over admission of the statement in evidence unless the statement helped its case. Although the statement is seemingly exculpatory on its face, it has a connotation that suggests involvement in the crime that appellant is confident cannot be proved. Why offer it otherwise?

II. Erroneous Instructions

Appellant alleges error by the court below in two instances. First, appellant attacks the court's comment that "[t]he defendant does have the burden of proving his innocence or producing any evidence." Second, appellant contends the court erred in giving instructions on alibi when it said, "When such a claim [alibi] is thoroughly established, it precludes the possibility of guilt."

The first instruction clearly seems to be either a slip of the tongue by the court or an omission by the reporter in transcribing the proceedings. (The State, by motion to this court, supplemented the record with an affidavit of the court reporter in which she swore that the error was hers and that the instruction should have read "the defendant does *not* have the burden" of proof.) In either case, the error was obviously an accidental one, not likely to be repeated in the event of a retrial; and since we are reversing the convictions as explained above, we see no need to address this issue further.

Likewise, the second instruction illustrates a mere poor choice of words, not a misunderstanding of the applicable law. This error, too, was accidental and unlikely to be repeated. We need not address it here.

III. Hearsay Evidence

At the sentencing hearing, the court permitted the State to introduce four types of documents, to-wit: commitment records of the Department of Corrections, commitment records of the Circuit Court for Baltimore County, docket entries, and charging documents. Appellant objects that these documents contained hearsay information and should have been excluded. We disagree. The commitment records, docket entries, and charging documents of the circuit court were certified as true copies by the clerk of the court. They were thus admissible under Md. Cts. & Jud. Proc. Code Ann. § 10-204 (1984). The other documents merely duplicated the information provided by the circuit court documents. We find no error in admitting to any of them.

IV. Mandatory Sentences

The State agrees with appellant, as indeed it must, that the court erred in imposing two mandatory sentences pursuant to Md. Ann. Code art. 27, § 643B. This is clearly prohibited by *Calhoun v. State*, 46 Md. App. 478 (1980), *aff'd* 290 Md. 1 (1981).

JUDGMENTS REVERSED

COSTS TO BE PAID BY BALTIMORE COUNTY.

EDITOR'S NOTE

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Supreme Court U.S.
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CLERK

No. 85-1928

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

STATE OF DELAWARE,

Petitioner,

v.

PERCY E. WAINWRIGHT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF DELAWARE

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Service of 2 copies of the
within is hereby acknowledged
this 16 day of July A.D. 1986
Attorney for Petitioner

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QUESTION PRESENTED FOR REVIEW

Do Rhode Island v. Innis and Edwards v. Arizona prohibit police from explaining to the suspect, during the booking process, the nature of the offense with which he is charged and the factual basis for his arrest?

OPINION BELOW

The opinion of the Supreme Court of Delaware is officially reported at 504 A.2d 1096 (1986). The slip opinion is appended to the instant brief at A-1-20.

JURISDICTION

The respondent does not contest the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3), to review the question presented.

CONSTITUTIONAL PROVISIONS INVOLVED

The respondent concurs with the recitation of the constitutional, statutory and rules provisions directly or indirectly involved in the present case, set forth in the petition.

STATEMENT OF THE CASE

In its Statement of the Case in its petition for review, the State of Delaware correctly notes that the decision of the Delaware Supreme Court below involved an application of the principles and rules articulated by this Court in Miranda v. Arizona, 384 U.S. 436 (1966), Edwards v. Arizona, 451 U.S. 477 (1981), and Rhode Island v. Innis, 446 U.S. 291 (1980), and their progeny, in its conclusion that certain statements made by the respondent to police were obtained in violation of his Fifth Amendment right to counsel during custodial interrogation. In its petition here, however, the

State -- as it did in the Court below -- has ignored or distorted several portions of the suppression-hearing record which were explicitly or implicitly relied upon by the Delaware Court in support of that conclusion, and which are also important to the question upon which the State seeks review now. In addition, the State has similarly ignored or distorted several aspects of the Delaware Court's decision itself. The respondent here will not recount in its entirety the record relevant to the suppression issue decided below nor the full analysis of the Delaware Supreme Court regarding that issue, but will endeavor to correct the aforementioned omissions and distortions of the record and of the lower Court's decision, made by the State in its petition.[1]

First, the State notes that, after a Delaware murder warrant was obtained for the respondent in the Hastings homicide based on the information provided to Delaware State Police by the co-defendant, David Dodson, the Maryland State Police, "accompanied by a Delaware officer," arrested the respondent in Baltimore on November 11, 1982, and the respondent was thereafter held in Maryland custody for several days before waiving extradition to return to Delaware. See State's Petition for Certiorari at pp. 5-6. Like it did below, however, the State has ignored the fact that Detective Willard Griffith of the Delaware State Police -- the officer to whom the respondent's challenged statements were made six days later -- was the "Delaware officer" who accompanied Maryland police in connection with the respondent's arrest in Baltimore. (TS-13; A-31). The State -- as it did below -- has also ignored the fact that, according to the testimony of Detective Griffith himself, the respondent was advised of the Miranda warnings by Maryland police following his arrest as a fugitive, and "didn't want to talk to" the officer. (TS-13; A-31). Hence, the record here established that Detective Griffith was aware immediately after the respondent's arrest in Baltimore, that the respondent wished to exercise his rights under Miranda and did not

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[1]The full transcript of the suppression hearing in the instant case, which was an abbreviated one, is appended hereto at A-21-51.

want to give a statement to police regarding the homicide.

Second, the State concedes here -- but did not below -- that the respondent would have been apprised of the "nature of the crime with which he (was) charged" in the instant case, in connection with his arraignment in Maryland as a fugitive, but suggests that the Delaware Court in its decision below misunderstood the scope of the information the respondent would have been given. See State's Petition for Certiorari at p. 6, n. 5. To the contrary, however, the Delaware Court accurately recited in its decision the information the Maryland court was required to give to the respondent under Md.Ann.Code, Art. 41, Sec. 16, et seq. (1982), upon his arraignment as a fugitive and also in connection with his subsequent waiver of extradition. See Wainwright v. State, supra, 504 A.2d at 1102. (A-16).

Third, the State has incompletely recounted -- like it did below -- the events which occurred upon the respondent's return to Delaware on November 16, 1982, in the company of Detective Griffith. See State's Petition for Certiorari at pp. 6-8. More specifically, according again to Detective Griffith's own testimony, upon their arrival at Delaware State Police Troop #4 in Georgetown, Delaware, around noon that day, the respondent "was first taken to the Troop Commander's Office at Troop 4, where he was advised why he was brought back to Delaware and what he was being charged with." (TS-6; A-24). Detective Griffith then read the respondent his Miranda rights by reciting them from his issue card, to which the respondent replied that "he would like to have an attorney present or like to have an attorney." (TS-6-7; A-24-25). Detective Griffith testified that, at that point, he "never asked (the respondent) no more questions," and took him to a nearby room for processing. (TS-7-8; A-25-26). Before processing, however, there was a further verbal exchange between the officer and the respondent, reflected in the following testimony:

> By Mr. Sandy: Did you, in fact, tell him at that point what he was being charged with?
>
> By Detective Griffith: Yes, sir. Before he was taken to the processing

> room, he was advised that he was being charged with first-degree murder of William Hastings, which occurred November 3, 1980, and the reason he was being charged for that murder was from the statement of co-defendant David Dodson.
>
> By Mr. Sandy: When you told that to the defendant, was that in an effort to question him or was that an informative speech?
>
> By Detective Griffith: That was an informative speech. It was part of the processing.

(TS-8; A-26). In subsequent testimony, Detective Griffith elaborated that he informed the respondent that Mr. Dodson "had given a complete statement how him and Mr. Wainwright had gone to Lord's Package Store and Mr. Wainwright ended up shooting Mr. Hastings," and that Mr. Dodson "had admitted going to the package store with Mr. Wainwright, but in his statement he stated that he had been going to stay outside the package store while Mr. Wainwright had gone in, and Mr. Wainwright had been the one that went inside the package store and committed the murder." (TS-16-17; A-34-35). Detective Griffith indicated that he conveyed the above-outlined information to the respondent within "five or six minutes" of when the respondent had been advised of the Miranda warnings and had invoked his right to counsel. (TS-16-17; A-34-35). There was no indication that the respondent said or did anything prior to the aforementioned comments of Detective Griffith, which prompted the officer to convey that information to him.

Detective Griffith testified that, following the foregoing exchange, the respondent did not say anything right away. (TS-17; A-35). He was processed and held at the troop until the magistrate returned from lunch at 1:00 PM, during which time he was fed. (TS-8; A-26). At 1:00 PM, he was transported by police vehicle the short distance to the magistrate court and, as the car pulled up to the court, Detective Griffith testified, the respondent "turned to me and stated to me, explained, 'I didn't kill that man.' He said, 'He stabbed me twice.'" (TS-9, 18-19; A-27, 36-37). Detective Griffith indicated that he thereupon "advised (the respondent) that since he had elected to have counsel, I could not talk to him about

the case." (TS-9, 19; A-27, 37). He testified that the respondent replied by asking him "if he could retract (that request)." (TS-9, 19; A-27, 37). Detective Griffith testified that he answered by telling the respondent that "we would go in and call the District Attorney, John Sandy . . . and also have a defense attorney present, and then he could tell his story, and if it was true that he had not pulled the trigger and killed the man, and if it was determined by (the District Attorney), that he could possibly be held as a material witness." (TS-9; A-27). Detective Griffith indicated that they then went into the magistrate court and he attempted to contact Mr. Sandy by telephone, without success. He then returned to the respondent, and "(a)t that point I asked him, I said, 'do you wish to tell me what happened?'" The respondent thereupon orally related his account of what had occurred at the time of the homicide, indicating, in substance, that Mr. Dodson had coerced him into driving him to the package store to rob it and to waiting outside for him while Mr. Dodson went into the store and, for undisclosed reasons, shot the clerk during the robbery attempt. (TS-11-13; A-29-31). No formal written or recorded statement was obtained. (TS-23; A-41). Detective Griffith testified that he did not promise or threaten the respondent to make the aforementioned statement, that the respondent was not under the influence of alcohol or drugs, and that he appeared in "full control of all his faculties" at the time of the statement. (TS-10; A-28). He also testified that, after asking if he could retract his request for an attorney, the respondent never again mentioned that he did not wish to talk without counsel present, or to otherwise remain silent. (TS-10; A-28). There is no indication in the record that the respondent was readvised of the full Miranda warnings prior to his statement inside the magistrate court, however. Moreover, Detective Griffith conceded that he made no effort to contact an attorney for the respondent before questioning him at the magistrate court, despite his indication to the respondent that he would do so. (TS-22; A-40).

In its Petition for Certiorari at p. 7, n. 7, the State admits that the Delaware Supreme Court in its decision below "expressed

some skepticism" about Detective Griffith's testimony that he always informs suspects of the evidence as well as the charges against them as a "routine" part of the booking process. Indeed, the Delaware Court expressly rejected that testimony -- and with good reason. See Wainwright v. State, supra, 504 A.2d at 1102-1103 (A-16-18). Apart from Detective Griffith's aforementioned testimony -- which was elicited in response to a patently leading question by the trial prosecutor -- there is not one scintilla of evidence in the record that informing suspects of the evidence against them is a "routine" aspect of the processing procedures utilized by the Delaware State Police. Moreover, the several "facts" asserted by the State in the above-noted footnote to bolster the testimony of Detective Griffith in that regard -- not all of which were advanced by the State to the Court below -- are, at a minimum, misleading.

In the first instance, Delaware Superior Court Criminal Rule 4(c)(3) does not require an arresting officer who does not have the arrest warrant in his possession, to inform the defendant being placed under arrest of the evidence upon which the warrant was issued, but requires only that he "inform the defendant of the offense charged and of the fact that a warrant has been issued." In addition, there is no indication in the record here that Detective Griffith did not have the arrest warrant for the respondent in his possession when the respondent was processed.[2] Hence, it is not clear that the above rule relied upon by the State now was even applicable to the arrest and processing of the respondent in the instant case. Furthermore, Delaware Superior Court Criminal Rule 5(b), does require that the committing

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[2]Indeed, since Detective Griffith had personally obtained custody of the respondent from Maryland authorities earlier that day, it is likely that he did have the warrant in his possession to verify his authority to take custody of the respondent thereunder. Under Rule 4(c)(3), where an arresting officer does have the arrest warrant in his possession at the time of an arrest, he need only show the warrant to the defendant upon request of the defendant. The record in the instant case does not reflect any such request by the respondent. Moreover, as detailed more fully, infra, the information included in the affidavit for the arrest warrant here, was far more abbreviated than the information conveyed orally to the respondent by Detective Griffith during processing.

magistrate at the time of a defendant's initial appearance on a warrant, inform the defendant of, inter alia, "the complaint against him and of any affidavit filed therewith ..." Under Delaware Superior Court Criminal Rule 5(a), the initial appearance of a defendant before a magistrate must take place "without unreasonable delay." Thus, a defendant in Delaware is promptly informed by a neutral and detached magistrate of the evidence upon which his arrest was based, and there is no need for police in processing a defendant in the inherently coercive atmosphere of a police station, to likewise relate such information to him.

In addition, the State's assertion that neither the trial court nor defense counsel at the suppression hearing expressed doubt that informing suspects of the evidence against them is a "routine" part of the booking process in Delaware, is not entirely accurate, in that defense counsel implicitly challenged Detective Griffith's testimony in that regard in his argument that the respondent's statement at the magistrate court was induced by the officer's recitation to the respondent of Mr. Dodson's statement. (TS-26-28; A-44-46). Moreover, the response -- or lack thereof -- of the trial court and defense counsel to such testimony does not establish -- as the State suggests --that either the court or counsel credited that testimony from their own experience, and certainly does not constitute evidence with respect to the accuracy of that testimony.

Finally, the State's indication that the Delaware Supreme Court refused to remand the present case upon the State's request in order to supplement the evidentiary record regarding the foregoing testimony, is likewise not completely accurate, in that the State's motion to remand did not expressly raise that issue. In addition, that motion was denied by the Delaware Court primarily because it did not comply with the rules and practice of the Court. (A-52).

It is also apparent from the totality of the record in the instant case that the purportedly benevolent intent of Detective Griffith with respect to apprising the respondent of the details of Mr. Dodson's statement is, as the Delaware Supreme Court clearly

concluded in its decision, unsupported by the evidence. As the Court observed there and as the respondent has pointed out here, Detective Griffith knew following the respondent's arrest six days earlier as a fugitive that he did not want to talk to police about the homicide -- a position which the respondent expressly reaffirmed directly to the officer upon his return to Delaware. Detective Griffith also presumably knew that the respondent would be informed of the charges against him and of the contents of the affidavit in support of the arrest warrant, upon his initial appearance before the Delaware magistrate scheduled for less than an hour after the respondent's arrival at Troop #4. In addition, Detective Griffith, who was an investigating officer in the Hastings homicide, almost certainly doubted the veracity of Mr. Dodson's implication of the respondent as the triggerman in the homicide, since -- as the State itself notes in its Petition for Certiorari at pp. 4-5 -- Mr. Dodson was the defendant who matched the description of the subject seen by witnesses outside the package store before the killing and with the gun after the killing; Mr. Dodson was the defendant who had obtained the gun from Roger Carl Jeffers sometime earlier, albeit in the company of the respondent; and Mr. Dodson was an escapee from a Maryland prison at the time of the homicide.[3] Hence, Detective Griffith must have at least strongly suspected that Mr. Dodson had lied to police with respect to who fired the fatal shot.[4] Despite all of the above, Detective Griffith nevertheless recounted to the respondent the full details of Mr. Dodson's statement, including the accusation that the respondent was the actual killer, within "five or six minutes" of the respondent's request for counsel. Moreover, the information he conveyed to the respondent at that time was -- as he

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[3]Mr. Dodson was serving time in Maryland for murder -- a fact which Detective Griffith had to know prior to his contact with the respondent in issue here, since, as the State points out at p. 5 of its Petition for Certiorari, Mr. Dodson was transferred from Maryland custody before his own statement to Delaware police was made.

[4]At both the respondent's trial and the later trial of Mr. Dodson, the State contended, in fact, that Mr. Dodson was the triggerman in the murder.

conceded at the suppression hearing -- far more comprehensive than the information included in the affidavit for the arrest warrant in the case, which simply stated, in pertinent part, that, "(o)n 11-11-82, David Dodson did confess to (the Hastings) murder and implicated Co-defendant Wainwright in said murder." (TS-24-26; A-42-44). In particular, there was no allegation at all in that affidavit that the respondent was the triggerman in the killing. Finally, following the respondent's indication to Detective Griffith outside the magistrate court that he was willing to talk to the officer, Detective Griffith did not readvise the respondent of the complete Miranda warnings; did not fulfill his promise to secure counsel for the respondent before questioning him; and led the respondent to believe that he may be held only as a "material witness" in the case if his story was credited by the prosecutor. The factual basis for the Delaware Supreme Court's rejection of Detective Griffith's testimony that informing the respondent of the details of Mr. Dodson's statement had a wholly innocent purpose, is thus substantial.[5]

Fourth, the State notes that defense counsel at the suppression hearing conceded that the respondent's brief comments to Detective Griffith outside the magistrate court, were "spontaneous." (TS-26-28; A-44-46). The State also notes that the trial court concluded, based primarily on that concession, that such comments demonstrated a desire on the part of the respondent to resume dialogue with police, and further concluded that the respondent validly waived his previously-invoked rights under

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[5]Although not a matter of record in the instant case, it is noteworthy that, in his testimony at the later trial of Mr. Dodson, Detective Griffith defined the term "processing" upon inquiry of the same trial prosecutor, as "advising the defendant what he is being charged with, fingerprinting, photographing, taking his personal history, and also obtaining a statement from the defendant." (A-53-57). Detective Griffith thus made no mention at that time that informing the defendant of the evidence against him is a "routine" part of the booking process. He did make clear, however, that obtaining a statement from the defendant is an ordinary component of processing. It is also noteworthy that the Delaware Supreme Court in a decision issued June 13, 1986, reversed the convictions of Mr. Dodson for Miranda error as well. See Dodson v. State, Del.Supr., -- A.2d -- (1986). (A-58-64).

Miranda, prior to his more detailed oral statement to the officer inside the magistrate court. (TS-28-30; A-46-48). The State thereafter asserts that the Delaware Supreme Court in its decision below, "rejected" the above-noted concession of defense counsel at the suppression hearing and held that all of the respondent's statements to Detective Griffith were barred under Edwards. See State's Petition for Certiorari at pp. 9-10. The State has not mentioned, however, that counsel for the respondent in the Delaware Supreme Court abandoned the concession of defense counsel at trial that the respondent's comments outside the magistrate court were "spontaneous," and argued that both defense counsel at trial and the trial court itself failed to consider whether Detective Griffith's recitation to the respondent of Mr. Dodson's statement, almost immediately after the respondent had invoked his Miranda right to counsel, had induced those comments and constituted the "initiation" by the officer of further conversation with the respondent in violation of Edwards. Indeed, because of the clearly erroneous concession of defense counsel at trial with respect to the "spontaneity" of those comments, the Delaware Supreme Court was required to review the respondent's contentions in that Court under the "plain-error" standard. See Wainwright v. State, supra, 504 A.2d at 1099-1101. (A-8-11). Moreover, the Delaware Court's "rejection" of defense counsel's concession in that regard at trial, is manifestly supported by the record, for the reasons outlined supra.

Fifth, the State notes that the respondent testified at trial in the present case in accord with his statements to Detective Griffith, and that testimony was rejected by the jury. See State's Petition for Certiorari at p. 9. The State fails to note, however, that the respondent's statements to that officer were the only evidence introduced in the State's case-in-chief at trial directly implicating the respondent in the Hastings homicide, and that the introduction of those statements clearly precipitated the respondent's testimony at trial. In addition, the State makes no mention of the fact that it effectively conceded in the Delaware Supreme Court that the admission of the respondent's statements, if

error, could not be considered harmless on the record here.[6]

Finally, the State asserts that the Delaware Supreme Court in its decision below "ignored the legitimate non-investigatory purpose behind informing suspects of the factual cause for their arrest," and that, as a consequence of its holding there, "disclosure of such information is always prohibited, at least where the revealed information is highly incriminating." See State's Petition for Certiorari at p. 10. It is evident, however, that no such broad rule was enunciated by the Delaware Court or is implicit in its decision in the instant case. To the contrary, that decision was carefully limited to the factual record presented here, and constitutes simply a straightforward application of the principles and rules articulated by this Court in Miranda, Edwards and Innis and their progeny, to that record. It is likewise apparent that the Court's conclusion that "the defendant's initial statement to Detective Griffith made outside the Magistrate's Court was an elicited response to a statement made a policeman which was reasonably likely to produce such a response," is manifestly supported by the overwhelming weight of the evidence, and that, since Detective Griffith's comments in issue were undisputedly made after respondent's invocation of his Miranda right to counsel, the Court's holding that the first prong of the Edwards test was not met here, is clearly correct. See Wainwright v. State, supra, 504 A.2d at 1103. (A-16-18).

THe respondent also notes that the indication by the State in its Petition for Certiorari at p. 10, n. 11, that the Delaware Supreme Court's observation that the waiver prong of Edwards was likewise not satisfied in the present case with regard to the respondent's statement inside the magistrate court, was "apparent dicta," also misrepresents the decision of the Court below. In fact, the Delaware Court explicitly held, based on the totality of the record here, that the aforementioned statement, even if

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[6]As the Delaware Supreme Court observed in its decision, "(e)xcept for (the above) statements, the State's evidence against Wainwright was essentially circumstantial ..." Wainwright v. State, supra, 504 A.2d at 1100. (A-10).

"separately evaluated" from the officer's earlier comments and the respondent's reaction thereto, did "not gain admissibility under the existing standards" of waiver enunciated by this Court in North Carolina v. Butler, 441 U.S. 369 (1979).[7] See Wainwright v. State, supra, 504 A.2d at 1103-1104. (A-18-19). That conclusion is also fully supported by the evidence in the present case, and constitutes an independent ground for the Court's decision below.

REASONS FOR DENYING THE WRIT

I. The State of Delaware has neither accurately and fully set forth the facts and the Delaware law pertinent to the question presented, nor the relevant details of the decision of the Delaware Supreme Court below.

Under 28 U.S.C. Sec. 1257(3), this Court's jurisdiction to review a state-court judgment on certiorari, is discretionary. Supreme Court Rule 17(1) provides that review on writ of certiorari "will be granted only when there are important and special reasons therefor." As the Court observed in Ross v. Moffitt, 417 U.S. 600, 616-617 (1974), its exercise of such discretionary review "depends on numerous factors other than the perceived correctness of the judgment (it is) asked to review." Among those factors, the respondent submits, should be the candor -- or lack thereof -- with which the petitioner seeking review presents the facts and the law relevant to the question presented. See, e.g., Superintendent v. Hill, 472 U.S. -- , 86 L.Ed.2d 356, 366-369 (1985) (Stevens, J., Brennan, J., and Marshall, J., concurring in part and dissenting in part) (failure of the Attorney General as the State's highest legal officer to accurately and fully disclose to the Court the state law pertinent to a question presented, should have resulted in a denial or dismissal of review).

As detailed in the Statement of the Case, supra, the State of

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[7] The Delaware Court first properly noted that, where the "initiation" prong of the Edwards test has not been met, there is no need to address the "waiver" prong of that test. See Wainwright v. State, supra, 504 A.2d at 1103. (A-18-19).

Delaware in its petition now before this Court, has neither accurately and fully set forth the facts and the Delaware law pertinent to the question upon which it seeks review here, nor the details of the decision of the Delaware Supreme Court below which are relevant to that question. Under those circumstances, the respondent submits that this Court should deny review of that petition.

2. The question presented here is predicated upon an issue of fact which was resolved against the State of Delaware by the Delaware Supreme Court in its decision below.

In connection with the exercise of its discretionary jurisdiction to grant certiorari review, this Court has long held that it "(does) not grant a certiorari (writ) to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). In the instant case, though, that is precisely what this Court would be required to do. More specifically, the question presented in the State's petition for review is predicated upon the "fact" that Detective Griffith's recitation of the details of Mr. Dodson's statement to the respondent, was simply a "routine" part of the booking process used by the Delaware State Police. That alleged "fact," however, is not established by the record here. Indeed, as the respondent pointed out in the Statement of the Case, supra, Detective Griffith's testimony -- which was wholly uncorroborated by any other evidence -- that apprising a defendant of the evidence against him is a "routine" component of the booking process utilized by that police agency, was clearly rejected by the Delaware Supreme Court in its decision below, and that conclusion is manifestly supported by the record. See Wainwright v. State, supra, 504 A.2d at 1102-1103. (A-15-18). Compare, United States v. Hinckley, D.C.Cir., 672 F.2d 115, 122-123 (1982) (testimony of agents that questioning of the defendant "was merely part of 'standard processing procedures' and was 'essentially administrative,'" was not entitled to credit). Hence, in order to address the question raised by the State here, this Court would be required to review -- and, indeed, reverse -- the factual

conclusion of the Delaware Court in that regard. The respondent therefore submits that review of the State's petition in the present case should likewise be denied for that reason.

3. There is no "dilemma" posed for police as a consequence of the decision of the Delaware Supreme Court below, and there is no conflict among the lower courts with respect to whether police conduct of the type in issue here constitutes "interrogation" under Rhode Island v. Innis.

In its effort to secure review by this Court of the decision of the Delaware Supreme Court below, the State in a considerably confusing and clearly strained analysis, asserts that the Delaware Court's decision creates a "dilemma" for police regarding whether they should apprise a defendant in the course of the arrest process of the charges and evidence against him and risk that such conduct will be construed as "interrogation" under Rhode Island v. Innis, supra, 446 U.S. at 300-301, or should avoid providing such information to a defendant and thereby call into question the intelligence of any subsequent waiver by the defendant of his rights under Miranda. The State further asserts that the lower courts are in conflict with respect to whether informing a defendant following an arrest of the charges and evidence against him, is the type of police conduct that is "normally attendant to arrest and custody" and therefore "exempt" from the definition of "interrogation" articulated by this Court in Innis. In order to resolve the foregoing alleged problems, the State contends that, "... assuming the legitimacy of a police policy to furnish such information to all suspects in the arrest process," a "case-by-case" analysis of the type applied by the Delaware Supreme Court here regarding whether such conduct constitutes "interrogation" under Innis, should be rejected in favor of a per se rule that such police conduct never constitutes "interrogation" under that decision when it occurs in the "arrest and booking context." See State's Petition for Certiorari at pp. 10-18. The respondent submits, however, that the above-noted assertions of the State as well as the per se rule it urges upon the Court here, are not supported by policy, reason or the case authorities upon which

it relies, and review should be denied here on that basis.

In the first instance, it is important to clarify what is not in issue in the present case as well as what is in issue here. Specifically, what is not in issue is whether apprising a defendant in the course of the arrest process of the charges against him, is permissible, in that the Delaware Court expressly noted that "it was clearly appropriate for Detective Griffith to complete the formalities of the booking process including, again, advising the defendant of the charges against him," before taking him to magistrate court for his initial appearance. Wainwright v. State, supra, 504 A.2d at 1103. (A-17). Hence, the decision of the Delaware Court in the instant case is fully consistent with the decision of the Colorado Supreme Court in People v. Spring, Colo.Supr., 713 P.2d 865, 872-874 (1985) (en banc), cert. granted, 54 U.S.L.W. 3738 (May 5, 1986) (No. 85-1517), that, "(w)hether, and to what extent, a suspect has been informed or is aware of the subject matter of the investigation prior to" a waiver of his rights under Miranda, is a factor in evaluating the "totality of the circumstances" with regard to the validity of that waiver. See also United States v. McCrary, 5th Cir., 643 F.2d 323, 328-330 (1981), and Carter v. Garrison, 4th Cir., 656 F.2d 68, 69-70 (1981), cert. denied, 455 U.S. 952 (1982). In particular, the decision below poses no "dilemma" for police regarding whether they can inform a defendant of the charges against him, following his arrest, to assist him in intelligently deciding if he should cooperate with police. In addition, that decision is consistent with the holdings of several other courts which have concluded that apprising a defendant of the charges against him in connection with an arrest, does not ordinarily constitute "interrogation" within the meaning of that term under Innis. See, e.g., United States v. Gordon, 2d Cir., 655 F.2d 478, 485-486 (1982); State v. Perez, R.I.Supr., 422 A.2d 913, 915-916 (1980); State v. White, Me.Supr., 460 A.2d 1017, 1020-1021 (1983). Compare also, United States v. Wilson, 9th Cir., 571 F.2d 455, 456-457 (1978), a pre-Innis decision.

What is in issue in the instant case is whether informing a

defendant of the evidence against him during the arrest process, is permissible, in that the Delaware Court also explicitly observed that, "(i)n going beyond the formalities of the booking process to describe the State's evidence, particularly the highly incriminatory accusations of Dodson, Detective Griffith engaged in a gratuitous and totally unnecessary tactic which was reasonably calculated to elicit a reaction from the defendant."[8] Wainwright v. State, supra, 504 A.2d at 1103. (A-17). With respect to that issue, the respondent first notes that neither Innis nor any other decision of this Court, or any of the lower court decisions relied upon by the State in its petition, has expressly or even implicitly held that apprising a defendant in the course of the arrest and booking process of the evidence against him, serves any "legitimate police policy" justifying an "exemption" of such police conduct from the scope of "interrogation" in all cases, as the State urges this Court to hold here. Indeed, police practices not amounting to explicit interrogation which focus -- truthfully or otherwise -- on impressing upon a defendant the evidence against him, are precisely the types of "psychological ploys" not-infrequently utilized by authorities to obtain statements, which led this Court in Innis to conclude that "interrogation" under Miranda could not be limited to simply "express questioning." See Rhode Island v. Innis, supra, 446 U.S. at 299-300. Indeed, even before this Court clarified the scope of the term "interrogation" in Innis, the lower courts generally concluded that confronting a defendant with the evidence against him, amounted to "interrogation" under Miranda. See, e.g., Combs v. Wingo, 6th Cir., 465 F.2d 96, 97-99 (1972), and its progeny. See also, Commonwealth v. Hamilton, Pa.Supr., 285 A.2d 172, 174-175 (1972), and Commonwealth v. Mercier, Pa.Supr., 302 A.2d 337, 339-340 (1973). Subsequent to the Court's decision in

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[8] As pointed out in the Statement of the Case and under Argument 2, supra, the Delaware Supreme Court in its decision below rejected the testimony of Detective Griffith that apprising a defendant of the evidence against him is a "routine" part of the processing procedure used by the Delaware State Police. For purposes of the present argument, however, it is assumed that such police conduct is a "routine" aspect of the booking process utilized by that agency.

Innis, the lower courts have similarly recognized that, in many instances, such police conduct is "reasonably likely to elicit an incriminating response from the suspect" of which police should be aware, and that it is the "functional equivalent" of "express questioning" in some cases and can thus constitute "interrogation" under Innis. See, e.g., United States v. Alexander, D.C.App., 428 A.2d 42, 44-52 (1981), and the cases cited therein; United States ex rel. Abubake v. Redman, D.Del., 521 F.Supp. 963, 972-977 (1981), vacated on undetermined grounds, 3d Cir., 696 F.2d 980 (1982); People v. Ferro, N.Y.App., 482 N.Y.S.2d 237, 240-241 (1984). In fact, in United States v. Alexander, supra, 428 A.2d at 44-52 -- a decision ignored by the State in the Court below and again in its petition here -- the District of Columbia Court of Appeals explicitly observed that informing a defendant of the evidence against him can be a "technique" relied upon by police to evoke an incriminating response, of the type expressly condemned in Innis. See Rhode Island v. Innis, supra, 446 U.S. at 301, n. 7. In addition, as discussed more fully in Argument 4, infra, such police conduct can improperly precipitate the "initiation" by a defendant who has asserted his right to counsel under Miranda, of further dialogue with police, contrary to the dictates of Edwards v. Arizona, supra, 451 U.S. at 484-485. Indeed, the State itself implicitly recognizes the "evocative" character of such information, in conceding that the holding it seeks from the Court here should be limited to the detailing of that information only in the "arrest and booking context." See State's Petition for Certiorari at p. 14, n. 15. Finally, as the respondent noted in the Statement of the Case, supra, a defendant -- at least in Delaware -- is informed of the contents of the affidavit in support of an arrest warrant by a magistrate within a relatively short time of his arrest.[9] Hence, given the "evocative" quality of such

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[9]The State in its Petition for Certiorari at p. 17, n. 17, indicates that "if the reasoning of the court below here stands ... a disclosure (of the evidence against a defendant) by the magistrate at the initial appearance would constitute 'interrogation.'" That assertion is unsupportable, however, in

(Footnote Continued)

information and the fact that a defendant will be provided with that information by a neutral source within a reasonable time of his arrest, it is difficult to fathom what "legitimate police policy" is served by the police conduct in issue here.

The respondent also points out that the indication by the State in its petition for review, that the decision of the Delaware Supreme Court in the present case deprives a defendant and ultimately his counsel of information regarding the evidence in the case which may be helpful to them in deciding whether to cooperate with police, is wholly disingenuous. Clearly, if a defendant wishes to have that information, he can simply ask for it. The Delaware Court did not hold, nor would the respondent argue in this Court, that providing such information to a defendant upon his request constitutes "interrogation" under Innis -- at least not in the vast majority of cases.[10] See, e.g., People v. Thomas, Ill.App., 424 N.E.2d 985, 988-989 (1981), cert. denied, 456 U.S. 993 (1982); United States v. Guido, 9th Cir., 704 F.2d 675, 677-678 (1983); United States v. Crisco, 9th Cir., 725 F.2d 1228, 1231-1232 (1984). In addition, that Court manifestly did not hold, nor would the respondent contend here, that apprising a defendant's counsel of the evidence -- upon his request or sua sponte -- is impermissible under Innis. Finally, it cannot be disputed that detailing the charges against a defendant is far less likely to precipitate an incriminating response from him, than detailing the evidence in the case. Hence, the rationale underlying the decision of the Colorado Court in People v. Spring, supra, is inapplicable in the latter instance, contrary to the apparent contention of the

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(Footnote Continued)
that, as the State itself agrees, any statements made by a magistrate to a defendant during the initial appearance do not occur in the course of "custodial interrogation." Hence, the prophylactic rules of Miranda and its progeny are simply not applicable under such circumstances. See, e.g., State v. McClain, Ind.App., 442 N.E.2d 1131, 1132-1134 (1982).

[10]Where a defendant previously invoked his right to counsel under Miranda, a request by him for information regarding the evidence in the case would also likely constitute the "initiation" by him of further dialogue with police under the first prong of the Edwards test applicable under such circumstances. Certainly, the Delaware Court below did not hold otherwise. See Argument 4, infra.

State.

The respondent further notes that the holding the State urges upon this Court in the instant case could, in fact, threaten legitimate law-enforcement interests, and would pose far greater "dilemmas" for police than the decision of the Delaware Court below. More specifically, if this Court should conclude that informing a defendant of the evidence against him is important to the intelligent exercise of his rights under Miranda, that holding would be applicable in the not-uncommon cases where police do not want to disclose the evidence in the case, as well as in those cases where they feel free to do so. Hence, the police could only maintain the confidentiality of the evidence at the risk of providing the defendant with a basis to challenge any subsequent waiver of his rights under Miranda as "unintelligent." Moreover, a "dilemma" would clearly arise in many cases regarding what evidence must be disclosed to assist the defendant in intelligently deciding whether to cooperate with police. All of the evidence gathered by police? Just the "principal" evidence? And what about exculpatory evidence, such as existed but was not disclosed to the defendant in the present case? Manifestly, those "dilemmas" are much more troublesome than the alleged "dilemma" created under the Delaware Court's decision, of whether any evidence should have been disclosed at all under the circumstances in issue here.

In addition, the respondent notes that where, as frequently occurs, the arresting and/or booking officer is not an investigating officer in the case, he is generally unfamiliar himself with the evidence underlying an arrest warrant, and is therefore hardly able to provide that information to the defendant. Thus, informing a defendant of the evidence against him simply cannot be a "routine" part of processing in every case.

The respondent also observes that the State does not deny here that, in many instances, police should and do know that informing a defendant of the evidence against him is, in fact, "reasonably likely to elicit an incriminating response" from him, within the meaning of Innis. The State apparently contends, however, that the "evocative" character of such information is irrelevant, so long as

it is provided to the defendant only in the course of the arrest and booking process. It is clear, however, that in exempting "words or actions on the part of the police" which are "normally attendant to arrest and custody" from the scope of "interrogation" under Innis, this Court contemplated that such words or actions would ordinarily be non-"evocative" in quality.[11] Certainly, this Court did not intend to permit police to insulate their conduct -- regardless of how "evocative" it might be -- from scrutiny under that decision, by simply affixing the label "routine processing" to it. Indeed, as the Court held in United States v. Hinckley, supra, 672 F.2d at 122-126, -- a decision also ignored by the State below and here -- even words or actions on the part of police which generally are merely part of the arrest and booking process, constitute "interrogation" under Innis, if police should know they are likely to elicit an incriminating response. Finally, where, as in Delaware, a purpose of the "booking process" is to obtain a statement from a defendant,[12] it would be particularly inappropriate to exempt the conduct of police in connection with such process from the scope of "interrogation" under Innis.

Lastly, the respondent points out that this Court in Innis made clear that the determination of whether the words or actions of police amounted to "interrogation," requires an examination of all the relevant circumstances, including both the conduct of police itself and the perception as well as susceptibilities of the defendant. See Rhode Island v. Innis, supra, 446 U.S. at 300-302. Hence, such determination must necessarily be made on a "case-by-case basis," as even the Ninth Circuit -- upon which the State has relied so heavily here -- has held. See United States v.

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[11] As the District of Columbia Circuit observed in United States v. Hinckley, supra, 672 F.2d at 122-123, in most jurisdictions, "(t)he standard booking process is 'a predominately clerical procedure, performed immediately or soon after the suspect is delivered to the precinct or district station;' its primary function is 'recordkeeping.'" Clearly, the words or actions of police in connection with that type of activity, as well as other common custodial activities, are what this Court considered in Innis to be "normally attendant to arrest and custody."

[12] See A-54, and Dodson v. State, supra, -- A.2d at --, (slip opinion at p. 3 n. 3). (A-60).

Booth, 9th Cir., 669 F.2d 1231, 1237-1238 (1981).[13] The "case-by-case" approach employed by the Delaware Supreme Court in its decision below, is thus fully consistent with -- and, indeed, mandated by -- this Court's holding in Innis, and is also in accord with the approach utilized by the other lower courts in making such determinations. In fact, none of the cases relied upon by the State hold that informing a defendant of the evidence against him -- or, for that matter, any other words or actions of police -- is police conduct which is exempt in every instance from the scope of "interrogation" under Innis. In addition, all of the cases cited by the State in which apprising the defendant of such information was determined to not constitute "interrogation," are distinguishable on their facts from the present case. Hence, the alleged "conflict" the State has asserted exists among the lower courts regarding the permissibility of such police conduct under Innis, is wholly illusory.

4. The police conduct in issue in the present case constituted the "initiation" by police of further dialogue with the respondent in violation of the per se rule adopted by this Court in Edwards v. Arizona.

In the Delaware Supreme Court, the respondent principally contended that Detective Griffith's conduct in reciting to the respondent the details of Mr. Dodson's statement, after the respondent's invocation of his right to counsel under Miranda, constituted the improper "initiation" by the officer of further

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[13] In Booth -- yet another decision ignored by the State in the instant case -- the Court also explicitly recognized in the context of "express questioning" of a purportedly "routine" character, "the potential for abuse by law enforcement officers who might, under the guise of seeking 'objective' or 'neutral' information, deliberately elicit an incriminating statement from a suspect," and therefore emphasized that "the ultimate test for whether questioning constitutes interrogation is whether, in light of all the circumstances, the police should have known that a question was reasonably likely to elicit an incriminating response." Id. at 1238. That analysis is fully in accord with the similar observations and conclusions of the District of Columbia Circuit in United States v. Hinckley, supra, 672 F.2d at 122-126, pointed out by the respondent before. The respondent submits that that analysis is also applicable where police provide information to a defendant they should know is likely to elicit an incriminating response.

dialogue with the respondent regarding the case, in violation of the per se rule adopted by this Court in Edwards v. Arizona, supra, 451 U.S. at 484-485. Although the respondent additionally argued that such conduct also amounted to "interrogation" under the definition of that term articulated by the Court in Rhode Island v. Innis, supra, 446 U.S. at 300-301, the respondent noted to the Delaware Court that it did not need to reach that question, if it agreed with his foregoing primary argument. The State, however, contended to that Court that police do not violate the rule in Edwards by continuing conversation about the case with a defendant who has requested counsel, unless their conduct does amount to "interrogation" under Innis. In its decision below, the Delaware Supreme Court did not undertake to resolve the question of whether police conduct not amounting to "interrogation" can constitute the improper "initiation" by police of further dialogue with a defendant who has asserted his Miranda right to counsel, nor has the State presented that question in its petition for review here. Instead, the Delaware Court held that the conduct of Detective Griffith did amount to "interrogation" on the totality of the record in the present case, and that the "initiation" prong of the Edwards test had thus not been met here. See Wainwright v. State, supra, 504 A.2d at 1101-1103. (A-17-18).

In its petition now before this Court, the State -- in a somewhat less-than-explicit fashion -- has essentially reiterated its position in the Court below, that no violation of Edwards arises unless police "interrogate" a defendant who has invoked his Miranda right to counsel. The State in its discussion of the question presented here, has thus made no distinction between cases in which the Edwards rule is applicable and those in which it is not. The respondent likewise reiterates his position advanced below, however, that the question of whether police conduct amounts to "interrogation," need not be reached, if such conduct constitutes the improper "initiation" by police of further dialogue regarding the case with a defendant who has requested counsel, contrary to the dictates of Edwards.

The respondent notes that this Court in Edwards and its

several subsequent decisions clarifying and applying the rule articulated in that decision, has never held that police conduct must amount to "interrogation" before an Edwards violation occurs. In Edwards itself, the Court spoke in broad terms of "communication, exchanges or conversations" as well as simply "dialogue," in its discussion of the concept of "initiation" there. See Edwards v. Arizona, supra, 451 U.S. at 484-485 and 486, n. 9. Moreover, in Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983), the Court made clear that the terms "interrogation" under Innis and "initiation" under Edwards are not synonymous, indicating with respect to the latter term that "initiation" occurs where any inquiries or statements by a defendant or a police officer tend to "open up a more generalized discussion relating directly or indirectly to the investigation." In Bradshaw, the Court added that inquiries or statements by a defendant or an officer "relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word is used in Edwards." Ibid. See also Edwards v. Arizona, supra, 451 U.S. at 490 (Powell, J., concurring) ("...police do not impermissibly 'initiate' renewed interrogation by engaging in routine conversations with suspects about unrelated matters"). (Emphasis supplied). Cf., Rhode Island v. Innis, supra, 446 U.S. at 300-301, and Argument 3, supra, regarding the definition of "interrogation" enunciated there. In addition, the Court has emphasized that the Edwards rule is a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in Edwards was." Oregon v. Bradshaw, supra, 462 U.S. at 1044. See also Solem v. Stumes, 465 U.S. 638, 646-647 (1984); Smith v. Illinois, 469 U.S. --, 83 L.Ed.2d 488, 493-494 (1984); and Shea v. Louisiana, 470 U.S. --, 84 L.Ed.2d 38, 43-44 (1985). Hence, the rule in Edwards affords a defendant the "right to be free of contact with authorities in the absence of an attorney," apart from simply routine custodial matters, as well as the "right to be free of interrogation" regarding the crime charged. Wyrick v. Fields, 459 U.S. 42, 47 (1982) (emphasis supplied). The concept of

"initiation" under Edwards is thus significantly broader that the concept of "interrogation" under Innis, contrary to the contention of the State in the Court below and in its argument here.

The respondent notes that, where the Edwards rule has been applicable, police-initiated statements or actions focusing on the evidence against the defendant, has apparently occurred only rarely -- an indication in itself that, in the view of most police officers, such conduct would be violative of Edwards. In the very few reported decisions in which it did occur, however, other than the decision of the Delaware Supreme Court in the instant case, the courts have uniformly held that such conduct constitutes a violation of the rule in Edwards, without expressly finding that it amounted to "interrogation" under Innis. See Bryant v. State, Md.Sp.App., 431 A.2d 714, 717-720 (1981), cert. denied, Md.App., 291 Md. 772 (1981), cert. denied, 456 U.S. 949 (1982); State v. Quinn, Md.Sp.App., 498 A.2d 676, 677-679 (1985); Conover v. State, Md.Sp.App., -- A.2d -- (1986) (slip opinion at pp. 3-7).[14] (A-65-72).

As the Maryland Court observed in Bryant v. State, supra, 431 A.2d at 718 -- a decision not even mentioned by the State in the present case, even though this Court denied the State of Maryland's petition for review there -- once a defendant has invoked his right to counsel under Miranda, "any attempt by the authorities to 'spark' the accused's 'own initiative'" in resuming dialogue with police regarding the case, will "contaminate" any subsequent waiver

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[14] In the only decision which has been relied upon by the State here or has come to the attention of the respondent's counsel that is arguably to the contrary, the North Carolina Supreme Court in State v. Williams, N.C.Supr., 333 S.E.2d 708, 717 (1985), held that providing the defendant who had requested counsel there with a copy of the inventory form relating to the search which was conducted, did not constitute the "initiation" by the officer of further conversation with the defendant in violation of Edwards. There, however, the Court emphasized that delivery of a search inventory form to a defendant is "routine" and, indeed, mandated by North Carolina law, and there were no surrounding circumstances which suggested that the officer's conduct was calculated to or likely to precipitate a response from the defendant. In addition, an inventory form of the type in issue in Williams, is clearly far less "evocative" in character than the incriminating statement of a co-defendant. Williams is thus distinguishable on its facts from the type of police conduct in issue in the above-noted cases and here.

by him of that right and render such waiver "a nullity" under Edwards. As the Court in Bryant additionally observed, in making clear to the defendant who had asserted his right to counsel there that his confederates were cooperating with police, the officer "was endeavoring to cause Bryant to retreat from the Miranda fortress and to surrender his will to the officer because the battle was lost anyhow. It is precisely that type of 'persuasion,' duress, coercion, or intimidation that is forbidden by Miranda and Edwards." Id. at 720. Moreover, as that Court noted in State v. Quinn, supra, 498 A.2d at 678-679, the fact that providing a defendant with a copy of the statements of his accomplices may be the "normal practice" of an officer, does not insulate such conduct from the reach of Edwards, where the defendant has requested counsel.

In its decision in the present case, the Delaware Supreme Court expressly relied in part on the observations and conclusions of the Maryland Court in Bryant and Quinn, and the Delaware Court's decision is wholly consistent with those decisions in light of the record here. See Wainwright v. State, supra, 504 A.2d at 1103. (A-15-18). More importantly, the decisions of the Maryland Court there and the Delaware Court below are manifestly in accord with the rationale and rule of this Court's decisions in Edwards and its progeny. For that reason, there is no need for this Court to even address the question presented by the State in its Petition for Certiorari, and review should be denied on that ground.

5. The decision of the Delaware Supreme Court below is predicated on an independent ground which is not implicated by the question presented here.

As noted in the Statement of the Case, supra, the Delaware Supreme Court in its decision below held that, even if the conduct of Detective Griffith which gave rise to the Innis/Edwards issue involved in the question presented here, was not impermissible, the respondent's alleged waiver of his Miranda rights prior to his most damaging statement to that officer inside the magistrate court, did not meet the standards for waiver enunciated by this Court in North

Carolina v. Butler, supra, 441 U.S. at 373, on the totality of the record in the instant case, and the "waiver" prong of the Edwards test was therefore also not satisfied here. See Edwards v. Arizona, supra, 451 U.S. at 486, n. 9, and Oregon v. Bradshaw, supra, 462 U.S. at 1044-1045. Hence, that decision is predicated on an independent ground which is not implicated by the question before this Court now, and review should be denied for that reason.

CONCLUSION

For the preceding reasons, the respondent respectfully submits that this Court should decline to grant review of the petition of the State of Delaware in the present case.

Respectfully submitted,

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Office of the Public Defender
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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PERCY EWELL WAINWRIGHT,	§	
	§	
Defendant Below,	§	
Appellant,	§	No. 365, 1983
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware in
STATE OF DELAWARE,	§	and for Sussex County
	§	Cr.A. Nos. S82-11-0061,
Plaintiff Below,	§	1061 and 2061
Appellee,	§	

Submitted: October 29, 1985
Decided: February 21, 1986

Before CHRISTIE, Chief Justice, McNEILLY, HORSEY, MOORE and WALSH, Justices, constituting the Court en banc.

Upon appeal from Superior Court. REVERSED and REMANDED for a New Trial.

Nancy Jane Mullen, Esquire, Assistant Public Defender, Wilmington. Attorney for Appellant.

Gary A. Myers, Esquire, Deputy Attorney General, Department of Justice, Georgetown. Attorney for Appellee.

WALSH, Justice:

The defendant, Percy Ewell Wainwright, was convicted following a jury trial in Sussex County of first degree felony murder, 11 Del. C. §636(a)(6), and possession of a deadly weapon during the commission of a felony. The State declined, during trial, to seek the death penalty, and the defendant was sentenced to life imprisonment without probation or parole on the murder charge with a consecutive fifteen year sentence on the weapons charge. The charges stemmed from his participation in the November 3, 1980, attempted robbery of a Bridgeville liquor store and the killing of a store clerk. A codefendant, David Wayne Dodson, was convicted of the same offenses in a separate trial and sentenced to life imprisonment after a jury declined to impose the death penalty.

Although the defendant assigns a number of errors alleged to have occurred at the trial level, we focus on but one. He argues that certain oral statements were obtained by the police in violation of his Fifth Amendment right to counsel under Miranda v. Arizona, 384 U.S. 436 (1955). Since we conclude that it was plain error to deny suppression of such statements we must reverse and remand for a new trial.

I

The factual record underlying the admissibility of the disputed statements is drawn from the suppression hearing

at which the only witness was Detective Griffith of the Delaware State Police. The defendant did not testify at the suppression hearing.

There were no eyewitnesses to the shooting of the liquor store clerk, and no identifiable fingerprints were recovered from the scene of the crime. However, police investigation led to the arrest of David Dodson on November 11, 1982, for the murder. Dodson told the police that he and the defendant were present at the time the clerk was shot, but that the defendant went into the liquor store to rob it and shot the clerk while Dodson remained outside. Based on Dodson's statement, a fugitive warrant was issued and the defendant was arrested at his residence in Maryland on the same day. Detective Griffith accompanied a Maryland State Police detective when the warrant was executed. The Maryland officer read the defendant his Miranda rights and advised Wainwright about the warrant on file in Delaware for first degree murder but the defendant declined to give a statement to Griffith.

The defendant waived extradition and was brought back to Delaware on November 16, 1982. On the morning of November 16, when Detectives Griffith and Lee of the Delaware State Police went to Anne Arundel County Prison to pick up the defendant and transport him to Delaware, the Delaware detectives did not read the Miranda rights to the defendant.

The detectives simply transported the defendant in silence to the Delaware State Police Barracks in Georgetown.

Upon arrival at the Barracks in Georgetown, the defendant was first taken to the Troop Commander's Office where he was advised "why he was brought back to Delaware and what he was being charged with." Detective Griffith read the Miranda rights to the defendant from a card issued to the state police. In response, the defendant stated that he would like to have an attorney present. At that point, Detective Griffith stopped questioning the defendant and took him to the processing room. Detective Griffith testified that before the defendant was taken to the processing room, however, he advised the defendant that he was being charged with "murder one of Mr. William Hastings at Bridgeville, Delaware," and that the reason he was being charged was that codefendant David Wayne Dodson had given a complete statement describing how he and Wainwright had gone to Lord's Package Store where Wainwright shot Hastings. Detective Griffith described the exchange as follows:

> Q. And you told him the substance of what David Dodson had said?
>
> A. Yes, sir.
>
> Q. What was that?
>
> A. That Mr. Dodson had admitted going to the package store with Mr. Wainwright, but in his statement he had stated that he had been going to stay outside the package store while Mr. Wainwright had gone in, and Mr. Wainwright

had been the one that went inside the package store and committed the murder.

Q. So within five or ten minutes after this man said he wanted an attorney, you were telling him what David Dodson had said?

A. I was advising him why he was brought back to Delaware and what he was being charged with.

Q. And you were telling him the substance of the statement that the police got from Dodson?

A. Yes, sir.

Q. What was his response to this?

A. There was no response.

After fingerprinting, the defendant was given lunch and placed in a cell. No conversation took place during lunch. At about 1:00 p.m., Detective Griffith took the defendant to the Magistrate Court, located approximately three hundred yards from the police station. Detective Griffith testified that as he pulled up to the Magistrate Court the defendant turned to him and said: "I didn't kill that man, he stabbed me twice." At that point, Griffith advised the defendant that since he had elected to have counsel, the detective could not talk to him about the case. The defendant then asked Griffith if he could retract his request for counsel, and Griffith told the defendant that he would call the "District Attorney" and have a defense attorney present, and then the defendant could tell his story. Griffith next told the defendant that if he had

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not pulled the trigger and killed the man, he might be held as a material witness.

Detective Griffith unsuccessfully attempted to reach a deputy attorney general but did not attempt to reach a defense attorney. Immediately after talking with the deputy attorney general's secretary, Detective Griffith asked the defendant whether he wanted to make a statement or tell the detective what happened. The defendant then made a statement in which he confessed to driving his pickup truck through Bridgeville on the night of the murder, but maintained that Dodson stabbed him after he refused to stop the truck. The defendant finally stopped the truck, and Dodson got out of the truck with a twelve-gauge shotgun. Wainwright waited and a short time later Dodson returned and told the defendant to "get out of here."

At the suppression hearing, defense counsel did not contest the admissibility of the first statement made by the defendant. Defense counsel conceded that "[c]ertainly the officer cannot be expected to control spontaneous statements." Instead, defense counsel challenged the admissibility of the defendant's second statement as a violation of the defendant's right to counsel under Miranda.

At the suppression hearing the prosecutor, citing Oregon v. Bradshaw, ___U.S.___, 103 S.Ct. 2830 (1983) argued that the defendant's statement as he arrived at the

Magistrate Court was, itself, initiation of further communication with the police, and the defendant's subsequent statement that "I don't want an attorney now" was a valid waiver of his right to counsel under Miranda, after which he willingly gave a statement. Defense counsel did not effectively rebut this argument, and the trial judge, after a recitation of the facts as he understood them, concluded that:

> The only thing that the State has to show is that the defendant was warned of his constitutional rights, that he understood them, and that he waived them. It is clear that he understood them from the fact that he exercised them the first time, and it is further clear that he wanted to waive them by the fact that he asked to waive them.
>
> * * *
>
> In this particular case, it is clear that he understood them and that he exercised them, and according to the testimony of Officer Griffith, he wanted to initiate a further conversation and withdraw the exercise of that right and wanted to make a statement.... I cannot say that giving him lunch, informing him of the evidence, and bringing him to the Justice of the Peace Court was such overbearing tactics by the police that he was not exercising in (sic) free will....

Because defendant's trial counsel conceded that the defendant's first statement was spontaneous, the trial judge focused only on the waiver aspect of the question of admissibility and ruled, in effect, that defendant's

desire to waive his previously invoked right to counsel was established by his own words.

II

As a threshold consideration we must confront the question of whether the scope of our review may extend to claimed error which was not raised at the trial level. Indeed, the State contends that the concession of partial admissibility by defense counsel not only misled the trial court but now requires this Court to rule upon a question not fairly raised on the trial record.

This Court, in the exercise of its appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision. Supreme Court Rule 8; Jenkins v. State, Del. Supr., 305 A.2d 610 (1973). On evidentiary issues, the general rule is that evidentiary questions may not be raised for the first time on appeal. Stevenson v. Henning, Del. Supr., 268 A.2d 872 (1970). Thus, failure to object to the admissibility of evidence in the trial court may preclude a party from raising the objection for the first time on appeal. See Young v. State, Del. Supr., 431 A.2d 1252 (1980); Rochester v. Katalan, Del. Supr., 320 A.2d 704 (1974); Del. R. Evid. 103.

To expedite finality and promote economy in litigation, Rule 103 of the Delaware Rules of Evidence requires the

parties to raise timely objections to evidence in the trial court or risk losing the right to raise evidentiary issues on appeal. Failure to make an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain. Goddard v. State, Del. Supr., 382 A.2d 238 (1977). Rule 103 allows the appellate court to take notice of "plain errors affecting substantial rights" of the parties on appeal, even though the error was not brought to the attention of the trial court. See Del. R. Evid. 103(d).

Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Dutton v. State, Del. Supr., 452 A.2d 127, 146 (1982). Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice. Brownwell v. State, Del. Supr., 427 A.2d 884, 893 n. 12. Recently, claims of error implicating basic constitutional rights of a defendant have been accorded review by this Court notwithstanding their nonassertion at trial. Deputy v. State, Del. Supr., 500 A.2d 581, 589

(1985); Flamer v. State, Del. Supr., 490 A.2d 104, 112 (1983).

The significance of the trial judge's ruling on the admissibility of the defendant's statements to Detective Griffith is obvious. Except for these statements, the State's evidence against Wainwright was essentially circumstantial, since Dodson, called as a witness by the defense, refused to testify on grounds of self-incrimination. It is equally clear that the question of the admissibility of Wainwright's statements was one of constitutional dimension. The U.S. Supreme Court's recent decisions in Edwards v. Arizona, 451 U.S. 471 (1981) and Oregon v. Bradshaw, ___U.S.___, 103 S.Ct. 2830 (1983) make it clear that once an accused has exercised his right to remain silent under Miranda, the determination of whether subsequent statements are admissible is based on a two-part test. For such statements to be admissible, the prosecution must establish that the accused initiated further contact with the police, and validly waived his previously invoked right to counsel. The first part of the Edwards test — the initiation of further communication by the accused — must be considered before proceeding to decide whether there was a valid waiver. Edwards, 451 U.S. at 485; Bradshaw, 103 S.Ct. at 2834.

In this case, defense counsel's concession that the defendant's first statement was "spontaneous" probably caused the trial judge to focus only upon the "waiver" part of the Edwards test. Although the prosecutor, in arguing for the admissibility of the statements, properly noted that the Bradshaw decision discussed the importance of determining which party initiated further conversation after the accused had invoked his right to counsel, the trial judge ruled that "[t]he only thing that the State has to show is that the defendant was warned of his constitutional rights, that he understood them, and that he waived them." Since this statement reflects an incomplete analysis of the proper test to determine whether both of the defendant's statements should have been admitted into evidence, this error is clearly prejudicial to substantial constitutional rights of the defendant and jeopardized the fairness of the trial process. Where there is plain error, the fact that the error may have been "invited" by the actions of defense counsel does not render it less significant or result in a forfeiture of appellate review. See State v. Harper, N.J. Super. App. Div., 319 A.2d 771, cert. denied, 65 N.J. 574, 325 A.2d 708 (1974); cert. denied, 68 N.J. 284, 344 A.2d 318 (1975).

III

Our review of the record requires that we examine the evidence presented by the State at the suppression

hearing in the light of the State's heavy burden of demonstrating the voluntary relinquishment by a defendant of his previously asserted request for counsel. We begin with the language of Miranda:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.
>
> * * * *
>
> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda, 384 U.S. at 473-75.

In Edwards the Supreme Court established a bright-line rule for determining compliance with Miranda. This rule was further clarified in Smith v. Illinois, ___U.S.___, 105 S.Ct. 490 (1984). In Edwards, the court established a "rigid prophylactic rule" that once an accused in custody expresses a desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him" unless there is a valid waiver of his request for counsel. Edwards, 451 U.S. at 485-86; Smith, 105 S.Ct.

at 492. In Edwards and Smith the Supreme Court clearly outlined the analysis which this bright-line rule establishes.

> First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

Smith, 105 S.Ct. at 493. The purpose of the Edwards rule is to prevent police badgering or overreaching in an effort to wear down the accused despite his request for counsel. Smith, 105 S.Ct. at 494.

The Edwards standard has not proved to be easy in application and, as the divergence of opinions in Bradshaw attest, is open to varying interpretations. The plurality in Bradshaw confirmed Edwards as holding that once the right to counsel has been asserted by an accused, no further interrogation should take place "unless the accused himself initiates further communications." 103 S.Ct. at 2834. Justice Powell, in a concurring opinion, opined that the only new element in Edwards was the emphasis on the prosecution's burden of proof where "the critical question of waiver focuses on whether the initial communication by the police was proper." 103 S.Ct. at 2838 n. 2.

In his dissenting opinion in Bradshaw, Justice Marshall claimed that eight Justices of the Court "manifestly agree" that Edwards created a per se rule.

* * *

> The rule is simply stated: unless the accused himself initiates further communication with the police, a valid waiver of the right to counsel cannot be established. If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver under Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The only dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for purposes of Edwards' per se rule.

103 S.Ct. at 2840 n.2.

Whatever nuances may lurk in Edwards, as interpreted by Bradshaw, for present purposes the controlling principle is clear: If the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver. Here it is not disputed that Wainwright actually invoked his right to counsel and thus activated the requirement that the State prove that his later incriminatory statements were the result of discussions initiated by him and were the product of a knowing and intelligent waiver of his rights under the Fifth Amendment. Wainwright's contention that Detective Griffith initiated the discussion which led to the statements, if supported by the record, would,

of course, preclude application of the initiation prong of Edwards and foreclose the State from discharging its burden of proof on the overall issue of waiver. We turn then to the question of whether the conduct of the police in this case amounted to "initiation" within the meaning of Edwards.

IV

Defendant argues that Detective Griffith's comments regarding the nature of the charge and his recitation of the substance of Dodson's statement implicating Wainwright constituted initiation of further conversation by the officer, after Wainwright had asserted his right to counsel. The State maintains that Detective Griffith's comments were mere amplification of the charges made incident to the routine booking procedure. The State points to the fact that the defendant's initial incriminating statement was not made in direct response to Detective Griffith's comments but occurred "spontaneously" approximately forty-five minutes after the defendant had been given lunch, awaiting the opening of the Magistrate's Court.

In Rhode Island v. Innis, 446 U.S. 291 (1980), the Court held that "interrogation" under Miranda need not amount to actual questioning and may instead be the "functional equivalent" of such questioning. The Court defined the latter to include "any words or actions on the part

of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 302.

The State's argument that Detective Griffith's recital of what Dodson had earlier told police concerning Wainwright's participation in the liquor store robbery was a normal part of the booking processing ignores what had already occurred up to that point. Wainwright had been arrested in Maryland six days earlier on the strength of a fugitive warrant. At the time of his arrest in Maryland, Wainwright, in Detective Griffith's presence, had been advised generally of the charges against him and had been read his Miranda rights. Presumably at the time of his court appearance to waive extradition, the defendant was again advised of the charges awaiting him in Delaware.[1]

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[1]In Maryland, under the Uniform Criminal Extradition Act, after arrest the accused must be taken before a judge of a court of record who is required to inform the accused of the demand made for his surrender and the crime with which he is charged, and that the accused has the right to demand and procure legal counsel; and if the accused states that he desires to test the legality of his arrest, the judge must fix a reasonable time within which the accused can apply for a writ of habeas corpus. Md. Ann. Code art. 41 §1 et seq. (1982). The accused may waive the issuance and service of the Governor's warrant for the arrest and all other procedure incidental to extradition proceedings by executing a writing in the presence of a judge which states that the accused consents to return to the demanding state. The judge must, however, inform the accused of his rights to the issuance and service of a warrant of extradition and of his right to obtain a writ of habeas corpus. Id. at §39.

Upon his arrival in Delaware the defendant was hardly in ignorance of why he was being processed. Notwithstanding the defendant's generalized knowledge of the charges against him, however, it was clearly appropriate for Detective Griffith to complete the formalities of the booking process including, again, advising the defendant of the charges against him before taking him to the nearest available Justice of the Peace for his initial appearance as required by 11 Del. C. §1909 and Superior Court Rule 5(a). In going beyond the formalities of the booking process to describe the State's evidence, particularly the highly incriminatory accusations of Dodson, Detective Griffith engaged in a gratuitous and totally unnecessary tactic which was reasonably calculated to elicit a reaction from the defendant.

The fact that Wainwright's elicited reaction came not immediately but forty-five mintues later when taken from his cell to the magistrate court does not sanitize it. The response made: "I didn't kill him, he stabbed me twice" was understood by Detective Griffith to be a denial of the killing but also a claim by Wainwright that Dodson had stabbed Wainwright. Clearly Wainwright's statement was directly responsive to Dodson's claim, as recited by Detective Griffith, that Wainwright had been the triggerman while Dodson had remained outside. Even though the statement tended to be exculpatory, in fact it was highly

inculpatory because it placed Wainwright at the scene and thus corroborated Dodson's statement to that effect.

Nor does the fact that the defendant's statement was made after he was placed alone in a cell render it a purely spontaneous one. Indeed, the opportunity to mull over the effect of Dodson's accusatory statements could reasonably have had the opposite effect — to impress upon the defendant the seriousness of his predicament and the need to rebut his codefendant's accusations. Any attempt to "spark" the accused's initiative to make a statement in the absence of counsel through presentation of evidence will contaminate the waiver. Bryant v. State, Md. Ct. Spec. App., 49 Md. App. 272, 431 A.2d 714, 718 (1981), cert. denied, 291 Md. 772 (1981); cert. denied, 456 U.S. 949 (1982); see also State v. Quinn, Md. App., 498 A.2d 676 (1985).

In sum, we conclude that the defendant's initial statement to Detective Griffith made outside the Magistrate's Court was an elicited response to a statement made by a policeman which was reasonably likely to produce such a response. Since the defendant's elicited statement followed his request for the assistance of counsel, its admission into evidence is barred under the evolving standards of Edwards and Bradshaw.

Having determined that defendant's initial incriminatory statement was neither spontaneous nor volunteered it is

unnecessary to determine whether his further statements, made after Detective Griffith reminded the defendant that he had asked for an attorney and the defendant's subsequent indication of a desire to retract his request are admissible. If, as clearly appears, the defendant's discussion of the incident was prompted by police initiation, subsequent waiver by defendant in the same continuing dialogue is also tainted. Moreover, even if defendant's second statement be viewed separately it was made only after Detective Griffith led the defendant to believe that he would contact an attorney who could be present before the defendant resumed his statement. Detective Griffith conceded that his effort to secure an attorney for the defendant was limited to a phone call to the office of the Deputy Attorney General. When he was unable to make contact with the prosecutor, the officer made no further effort to contact defense counsel and never made any effort at direct contact with the Office of the Public Defender. Thus we need not decide whether the subsequent statement by the defendant was the result of a fresh waiver made after a good faith, but unsuccessful, effort to provide the defendant with counsel. Even if the second statement is separately evaluated, it does not gain admissibility under the existing standards of "strong proof of the validity of that waiver." See North Carolina v. Butler, 441 U.S. 369, 374 (1979).

V

Because we conclude that the defendant's statements to Detective Griffith are rendered inadmissible by reason of the violations of his right to counsel under the Fifth Amendment, we decline to address his claim that his Sixth Amendment right to counsel is equally implicated. We need not, and do not, decide whether the proceedings against the defendant had reached the critical stage in the adversary process where the right to counsel was mandated in any event. See Deputy, 500 A.2d at 590. We note, however, that even though the defendant's statements were made immediately preceding his initial appearance before a magistrate in Delaware, he had, as part of the extradition process apparently appeared before the District Court in Maryland earlier that day. Moreover, if defendant's statements fail to gain admissibility under the standards which control his right to counsel under the Fifth Amendment, a fortiori, it is difficult to see how the State could meet the more exacting standards for admissibility which govern waiver of the Sixth Amendment right to counsel. See Massiah v. United States, 377 U.S. 201 (1964).

* * * *

The conviction is REVERSED and the case is REMANDED for a new trial.

PROCEEDINGS

* *

MR. SANDY: The State is prepared to go forward in the matter of State of Delaware versus Percy Ewell Wainwright, also known as John Wainwright. A motion has been filed to suppress a statement made by Mr. Wainwright to Detective Buddy Griffith of the Delaware State Police. We are prepared to go forward with that hearing at this time.

THE COURT: All right, you may proceed.

MR. SANDY: The State calls as its first witness, Detective Griffith.

Whereupon,

WILLARD F. GRIFFITH

was called as a witness by and on behalf of the State of Delaware and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SANDY:

Q Detective Griffith, is it true you are employed in a criminal investigative capacity by the State of Delaware as a Delaware State Police Detective?

A Yes, sir.

Q In that capacity have you ever had occasion to come

in contact with one Percy Wainwright, also known as John Wainwright?

A Yes, I have.

Q Do you see the person in the courtroom today that you know as Percy Wainwright?

A Seated in the first table on the right in the white T-shirt.

MR. SANDY: May the record reflect he indicated the defendant, Percy Ewell Wainwright.

BY MR. SANDY:

Q When did you come in contact with Mr. Wainwright for the first time?

A The first encounter was on November 11, 1982.

Q Where did that take place?

A The first encounter was at his residence in Baltimore.

Q Did you subsequently have occasion to come in contact with him again?

A Yes, sir.

Q Explain where that took place and how.

A On November 16th of 1982, myself and Detective Cliff Lee picked him up at the prison just on this side of the Bay Bridge. I will give you the name of the prison. Anne Arundel Detective Center. I picked him up there, where he had

waived extradition and was brought back to Delaware State Police Barracks in Georgetown, Delaware.

Q Approximately what time did you arrive back in Delaware?

A It was just before noontime.

Q Did you subsequently have occasion, after returning to the State of Delaware, to have a conversation with Mr. Wainwright?

A Yes.

Q When did that take place?

A At that same time at the Delaware State Police Barracks at Georgetown.

Q Approximately what time?

A Right around noontime.

Q What condition was Mr. Wainwright in at the time?

A As far as I could tell, very good condition. He walks with a limp, but I think that is something he has had quite a long time.

Q Would you please describe his emotional condition for the Court?

A Again, as far as I could tell, normal.

Q Physically, were you able to observe whether or not he appeared to be under the influence of alcohol?

A No, sir, he did not appear to be under the influence

of alcohol.

Q Drugs?

A No, sir.

Q Before you spoke with him, had he been given an opportunity to eat or drink?

A No. We arrived back to the barracks just before noontime, and I began to arraign and process him at that time. Eventually we bought lunch for him.

Q Who all was processing him?

A Just myself.

Q Where were you doing that? In Troop 4?

A He was first taken to the Troop Commander's Office at Troop 4, where he was advised why he was brought back to Delaware and what he was being charged with.

Q At that time did you have occasion to say anything to him regarding what is commonly known as Miranda rights?

A Yes. His Miranda was recited from the issue card that we are issued.

Q Do you have that card with you today?

A Yes, I do.

Q Would you recite to the Court what of those rights you read to him, if any?

A This is the issued card that the Delaware State

Police are issued. It reads at the top,

"Miranda Warning. You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to talk to a lawyer and have him present with you while you are being questioned; if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one. If you decide to answer any questions with or without an attorney present, you may stop at any time during the questioning."

Then it has after the warning,

"In order to secure a waiver, the following questions should be asked and an affirmative reply to each question:

"Number One, do you understand each of these rights that I explained to you?

"Number two, having these rights in mind, do you wish to talk to me now?"

Q What was his response to those questions?

A He stated he would like to have an attorney present or like to have an attorney.

Q At that point, what did you do?

A I never asked him no more questions. I took him to

the processing room which is across the hall, and he was fingerprinted and an arrest card was filled out.

Q Did you, in fact, tell him at that point what he was being charged with?

A Yes, sir. Before he was taken to the processing room, he was advised that he was being charged with first-degree murder of William Hastings, which occurred November 3, 1980, and the reason he was being charged for that murder was from the statement of Co-defendant David Dodson.

Q When you told that to the defendant, was that in an effort to question him or was that an informative speech?

A That was an informative speech. It was part of the processing.

Q After you processed him, what happened?

A Okay. After he was fingerprinted, the Magistrate Court judge was not available until 1:00 p.m. in the afternoon. So we bought lunch for him, and he was allowed to eat lunch. At 1:00 o'clock he was taken to the Magistrate Court.

Q Did you arrive at the Magistrate Court?

A Yes, sir.

Q How far is Magistrate Court from Troop 4?

A Approximately three hundred yards.

Q Prior to your entering Magistrate Court, did you have

occasion to have another conversation with Mr. Wainwright?

A Yes, sir.

Q How did that arise?

A When I pulled up to Magistrate Court, Mr. Wainwright turned to me and stated to me, explained, "I didn't kill that man." He said, "He stabbed me twice," and I advised him that since he had elected to have counsel, I could not talk to him about the case.

Q What was his response to that?

A He asked me if he could retract it.

Q What did you do then?

A I told him we would go in and call the District Attorney, John Sandy, yourself, and also have a defense attorney present, and then he could tell his story, and if it was true that he had not pulled the trigger and killed the man, and if it was determined by you, that he could possibly be held as a material witness.

Q Subsequent to his asking you if he could retract his request for an attorney, did he make a statement to you regarding the incident?

A No, sir. Okay, I am sorry.

Q After he asked if he could retract his statement to you asking for an attorney, did he make a statement to you

regarding the Hastings' homicide?

A Yes, sir, he did.

Q Did you promise or threaten him anything to make him make that statement?

A No, sir.

Q At the time he made that statement, did he appear to be in full control of all his faculties?

A Yes, he did.

Q Did he appear to be under the influence of alcohol?

A No, sir.

Q In your training have you had occasion to observe people who were under the influence of controlled substances?

A Yes, sir.

Q Did he appear to be under the influence of any controlled substance?

A No, sir, he didn't.

Q What was his mental condition?

A Normal. He appeared to be normal.

Q At any time after he asked if he could retract his request for an attorney, did he ever again indicate to you that he did not wish to speak with you or that he wished to have an attorney present?

A No, he didn't.

MR. SANDY: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. HALLER:

Q After he started giving his statement where Mr. Sandy left off, what did he say?

A Okay. This is the statement in Magistrate Court when we were sitting and waiting for the judge? Is this the statement you are talking about?

Q Give us that one first.

A When I went into Magistrate Court, we made the call to Mr. Sandy, whose secretary stated that he would call back immediately. At that point I asked him, I said, "Do you wish to tell me what happened?," and this is when he went into the statement where himself and David Dodson had been driving through Bridgeville approximately November 3, 1980. They had been drinking most of the day. David Wayne Dodson had been talking about how he had wanted to perform a robbery to get some money. He said that he, Mr. Wainwright, stated that he did not want to participate in any robbery and he would not go along with it. While they were riding by the package store in Bridgeville, Lord's Package Store, where the victim was working, he, David Wayne Dodson, told Mr. Wainwright to stop the pick-up.

This is where he was going to perform the armed robbery.

Mr. Wainwright would not comply with stopping, and he stated at that time David Wayne Dodson leaped across and stabbed him twice. He turned right on 404 right as soon as you go through Bridgeville. He stopped at a place on the right by a factory or by some type of plant. There David Wayne Dodson got out of the pick-up with a twelve-gauge shotgun.

Mr. Wainwright stated a short time later Mr. Dodson came back and jumped in the pick-up with his shotgun and told him, "Get out of here." On the return to Federalsburg, where both of them were staying, Mr. Dodson told Mr. Wainwright that he had had to kill the man in the package store.

Q That was the end of the statement at Magistrate's Court?

A That was the end of the statement referring to the murder. Then he went on to -- then he talked about what happened after they returned back to Federalsburg. I think they had had an argument, and Mr. Wainwright had returned to Baltimore and Mr. Dodson had gone his own separate way.

Q When did they have the argument?

A Well, apparently after -- the argument stemmed from the murder, and Mr. Wainwright did not want any --

Q They went back to Federalsburg that evening?

A They were staying in a camper behind a garage on the way back to Federalsburg.

Q That evening they had the argument in Federalsburg?

A No. After that incident occurred that Mr. Wainwright stated, him and Mr. Dodson parted ways.

Q Is there any time sequence on that?

A I don't know about any time sequence.

Q When did you first see Mr. Wainwright? What time?

A The very first time?

Q Yes.

A The very first time was November 11, 1982, when myself and Maryland State Police Detective Ward went to the residence where Mr. Wainwright was staying.

Q Was Wainwright given Miranda rights on November 11th?

A I feel certain Detective Ward gave him Miranda. I didn't talk to him. I didn't give him Miranda, because I didn't talk to him. He didn't want to talk to me. I didn't question Mr. Wainwright.

Q You feel certain that the Maryland Police would have given him them as a matter of practice?

A I believe I looked through the report from the Maryland State Police, which I have with me, and I believe it is in there that Detective Ward did read him Miranda.

Q You did not give him Miranda on the 11th?

A No. No, sir.

Q No statement was taken from Wainwright on the 11th?

A No, sir.

Q Did you see Wainwright on the 12th?

A No.

Q When did you see him again?

A November 16th.

Q When did you see him on the 16th?

A When I picked him up at the Anne Arundel Prison.

Q At what time?

A I don't know the exact time. I would say it is a little over an hour back. We arrived back at 12:00. I probably picked him up around 10:30, or shortly thereafter.

Q You picked him up at 10:30 and you rode back to Delaware?

A Yes, sir.

Q Were there any Miranda rights given at that time in that time sequence?

A None that I can recall, no, sir. There were no questions asked pertaining to the murder.

Q Who did he ride back with?

A He rode back with myself and Detective Cliff Lee.

Q From the police car he was taken right back to the Troop in Georgetown?

A Yes, sir.

Q What time would that be?

A Shortly before noon when we arrived back to the State Police Barracks.

Q When did he leave the State Police Barracks to go to the Magistrate's Court?

A The Magistrate was available at 1:00. Right around 1:00. It was right around 1:00 p.m. when we left Troop 4 and went to Magistrate's Court.

Q Were any Miranda rights given between noon and 1:00?

A Yes, sir. When we went to the Troop or when we went to the Troop Commander's Office for him to be formally processed, Miranda was read from the issue card which I previously read.

Q Give us a time on that.

Q We entered the Troop Commander's Office right around 12:00 noon. That was done immediately upon going into the room.

Q They were given one time, as far as you know?

A Yes, sir.

Q When they were given, the Defendant said he wanted an attorney?

A Yes, sir.

Q And your response was what?

A At that time I did not ask him any questions. I advised him why he was being charged, why he was brought back to Delaware, and what Co-defendant David Wayne Dodson had implicated.

Q You told him what about Dodson?

A What he was advised that he was being charged with, murder one of Mr. William Hastings at Bridgeville, Delaware, and the reason he was being charged is Co-defendant David Wayne Dodson had given a complete statement how him and Mr. Wainwright had gone to Lord's Package Store and Mr. Wainwright had ended up shooting Mr. Hastings.

Q Approximately what time would it have been that you told Wainwright that David Dodson had ended up shooting Mr. Hastings. Approximately what time would it have been that you told Wainwright that David Dodson had given a complete statement?

A If he did not request an attorney, he would have been told that almost immediately. So we are talking within a time span of five or six minutes.

Q So we are talking about -- just guessing -- 12:05?

A Approximately, yes, sir.

Q And you told him the substance of what David Dodson had said?

A Yes, sir.

Q What was that?

A That Mr. Dodson had admitted going to the package store with Mr. Wainwright, but in his statement he had stated that he had been going to stay outside the package store while Mr. Wainwright had gone in, and Mr. Wainwright had been the one that went inside the package store and committed the murder.

Q So within five or ten minutes after this man said he wanted an attorney, you were telling him what David Dodson had said?

A I was advising him why he was brought back to Delaware and what he was being charged with.

Q And you were telling him the substance of the statement that the police got from Dodson?

A Yes, sir.

Q What was his response to this?

A There was no response.

Q After you finished informing him of the charges and telling him the substance of the statement of Mr. Dodson, what was done next?

A Then he was placed in -- I believe he was placed in a

detention cell while lunch was brought to him.

Q Was anyone talking to him while he was in the cell?

A I am not exactly sure whether he was placed in the cell or whether he remained in the room and was just watched. But there was no questions asked. No conversation.

Q When did Mr. Wainwright next speak, and what did he say?

A When we were on our way to Magistrate's Court and parked on the parking lot of Magistrate's Court, he turned to me and said that he did not kill that man.

Q What time would this be?

A It was right around 1:00 o'clock, 1:00 p.m. Approximately one hour later.

Q Were you the only person in the car who drove --

A Yes, sir.

Q --Wainwright down?

A Yes, sir.

Q Did you have any conversations with him on the way to the Magistrate's Court?

A No, sir. Like I said before, it's only about three hundred yards.

Q So at 1:00 o'clock he says he did not kill the man?

A Yes, sir.

Q What else did he say?

A Okay. This is when he stated that he did not kill that man and that he had been stabbed twice by Mr. Dodson. This is when I informed him he had requested counsel and that I could not speak with him.

Q What did he say to that?

A That is when he asked me if he could retract his request.

Q So we are still around 1:00 o'clock?

A Yes, sir.

Q Then you went into the Magistrate's Court building?

A Yes, sir.

Q And the Magistrate's Court building is one-tenth of a mile from the Troop?

A Yes. Like I said, approximately three hundred yards from Troop 4.

Q You called Mr. Sandy's office?

A Yes, sir.

Q What time would that be?

A As soon as I went in Magistrate's Court. Shortly thereafter. I don't know the exact times.

Q A little after 1:00? A few minutes after 1:00?

A I would say so.

Q Then when you hung the phone up, did you talk to Mr. Wainwright again?

A After talking with Mr. Sandy's secretary, Lucinda, who stated he would call back immediately, that is when I asked Mr. Wainwright did he wish to make a statement at that time or did he wish to tell me what happened at that time.

Q Where were you in the Magistrate's Court?

A There is a little room that used to be the officers' room. As you go in the front door and turn left down the hallway, you turn to your right immediately, and there is a little room in there that they keep documents and forms, a table and two chairs.

Q We are talking around 1:05 or 1:10, as far as time goes?

A Yes. Uh-huh.

Q So this is a little more than an hour after he said he wanted a lawyer?

A Yes, sir.

Q In between that you had informed him of the charges against him?

A Yes, sir.

Q And you had told him the substance of the statement that the other State Police had obtained from David Dodson?

A I informed him of the reason why he was charged and brought back to Delaware, yes, sir.

Q Are you just saying you were telling him what he was charged with or are you saying what he is charged with and that saying what Dodson said, as far as you were concerned?

A I was informing him of the reason why he was charged with first-degree murder, and the reason he was being charged is by a statement from the co-defendant, David Wayne Dodson.

Q Did you tell him what that statement was?

A I told him about the statement Mr. Dodson had given which Mr. Wainwright had been the one who pulled the trigger that killed Mr. Hastings.

Q Previously you said you could not talk to him without an attorney being present; is that right?

A You mean prior to exiting the vehicle that since he requested counsel, I could not speak with him? Yes.

Q You had told him that before, and then when you get into Magistrate's Court, you ask him if he wished to make a statement?

A Yes. I asked him if he wished to tell me what happened then.

Q They would seem to be different positions that you were taking. Why, at one time, do you tell him you cannot talk

to him because he has asked for an attorney, and then an hour later you say, "Do you wish to make a statement"?

A When he made that statement to me, "I didn't kill that man. He stabbed me twice," I advised him at that point, "If you requested counsel, I cannot speak with you on the subject." At that point he turned to me and said, "Can I retract that statement?"

Q And you said?

A This is when we went inside and attempted to call Mr. Sandy.

Q You did not get through to Mr. Sandy?

A No, sir. I left word with his secretary to call me.

Q You did not get through to any other attorney?

A No, sir.

Q Then you went back to him and asked him whether he wanted to make a statement?

A Yes, sir.

Q That was five or ten minutes after you informed him that you would have to talk to Mr. Sandy before taking the statement?

A Pardon me again?

Q That was five or ten minutes after you had told him that you could not take his statement and that you would have

to call Mr. Sandy?

A I advised him that I could not speak with him on the subject because he had requested counsel. This is when he turned to me and wished to know whether he could retract that statement. This is when we went in and called Mr. Sandy to inform him what was going on. At that point Mr. Wainwright -- the way I felt -- had elected to make a statement when he turned to me and said, "Can I retract my statement? Can I retract wishing to have an attorney?"

Q You did not take any written statement?

A No, sir.

Q You did not take any taped statement?

A No, sir. I advised Mr. Wainwright that after speaking with Mr. Sandy -- or that I didn't want to do anything formal like that until speaking to Mr. Sandy and his attorney.

Q Then in this interval of when he first claimed his Miranda rights and when you were asking him about making a statement, he was fed?

A Yes, sir.

Q When he was in the Magistrate's Court, was he shackled?

A The only thing he would have would be handcuffs on his wrists.

Q Was there anybody else in this room where he was

taken?

A No, sir. There is other people in the court and throughout the court, but not in that particular room.

MR. HALLER: Thank you.

REDIRECT EXAMINATION

BY MR. SANDY:

Q Officer Griffith, isn't it true that contained in the affidavit of probable cause for the warrant issued against Percy Ewell Wainwright on November 11, 1982, there is a reference to statements made by Dodson?

A Yes, sir, there is.

Q Is that, in fact, a true and accurate copy of the affidavit for the warrant for Mr. Wainwright's arrest on the charge of murder in the first degree?

A Yes, sir, it is.

MR. SANDY: Inasmuch as this is my only copy, I would ask the Court to take judicial notice that that is contained in the affidavit of probable cause for the warrant for the arrest of Mr. Percy Ewell Wainwright on the charge of murder in the first degree. That warrant is part of the Court's file.

THE COURT: Are there any objections?

MR. HALLER: I have no objection. But I think that the paragraph that he is talking about, which is probably less

than twenty-five words, should be read into the record.

MR. SANDY: It is Number Four on the list.

"On 11-11-82, David Dodson did confess to said murder and implicated Co-defendant Wainwright in said murder."

THE COURT: Is there anything further from this witness?

MR. SANDY: I have nothing further.

RECROSS EXAMINATION

BY MR. HALLER:

Q Am I to understand then that you read from the probable cause warrant to Wainwright?

A No, sir, I did not.

Q Did you give him more details than is in Allegation Number Four? Did you give Wainwright more detail as regards what David Dodson said than what is stated in Allegation Number Four on the probable cause warrant?

A Yes, sir, I did. I advised him -- you want me to go into what I said again?

Q Could you give us some time factor as to how long it took you to tell Wainwright the Dodson statement, as you understood it?

A I can tell you what I said, and you can judge how long

it would take. It would be better than me guessing how long it would take. I advised him he was being charged with first-degree murder of the murder of William Hastings, Bridgeville, Delaware, and Co-defendant David Wayne Dodson had confessed to being present during the crime and had stated that Percy Wainwright, John Wainwright, had gone into the package store to commit the robbery and had shot and killed Mr. Hastings.

Q Do you normally inform defendants as to what is on the probable cause sheet?

A I inform them why they are being arrested, not what is on the probable cause sheets, because I am sure what I tell them is on the probable cause sheet, if you understand what I am saying.

MR. HALLER: I have no other questions.

MR. SANDY: I have nothing further, Your Honor.

THE COURT: You may step down.

(Witness steps down.)

MR. SANDY: The State rests.

MR. HALLER: We will not present testimony on this point.

THE COURT: Do you wish to argue this point?

MR. HALLER: I would argue to the Court that the defendant claimed his Miranda right at noontime. Then thereafter

he was fed, and at 1:00 o'clock, according to Mr. Griffith, he made the spontaneous statements about how he did not kill Mr. Hastings and regarding the stabbing. I am not directing my comments to any spontaneous statements made. Certainly the officer cannot be expected to control spontaneous statements. However, as regards the statements said thereafter, after we have the officer saying, "I cannot talk to you," or, "We will call the Attorney General's Office and we will see about a material witness. I cannot get through to the Attorney General. Do you want to tell me about it?," in the Magistrate's Court when the man has handcuffs on a little more than an hour after the man originally claimed his Miranda rights and sometime after Mr. Griffith told Mr. Wainwright that he understood from the Dodson statement that Dodson was saying that Wainwright was the murderer, I would certainly say those statements, the statements after the call to Mr. Sandy's office, should be suppressed.

THE COURT: Mr. Sandy?

* *

THE COURT: Thank you.

MR. HALLER: I would like the State to give time factors as regards that opinion, if it knows, as to whether we are talking about a short time of one hour with a man eating in between or whether we are talking about days going by.

* *

MR. HALLER: That appears to talk about a two-day period. Certainly that is different from the situation where the man claims the rights. The man is told there is evidence against him from the co-defendant, and the man is fed, and the man is brought to the Court all within an hour. If we have another day going by, it gives the defendant time to reflect. It gives him time to think about, "I don't want to make a statement." That puts it in a new light, and those are new circumstances. That is not what we have in Mr. Wainwright's case.

THE COURT: Gentlemen, as I understand the facts, the defendant was picked up on November 16, 1982, at approximately 10:30 from the Anne Arundel County Prison in Maryland, brought back to Troop 4, arriving back around noontime. He was advised of his constitutional rights. The defendant chose to exercise those rights, which indicates to me he understood them.

He was then informed of the charges pending against him, including the evidence that the State had. He was placed in the cell or left in the room. He was given lunch around 1:00 o'clock. He was taken to the Justice of the Peace Court for a preliminary hearing or, at least, bail being set and arraingment.

On the way there, he decided that he wanted to speak

to the police officer. The police officer again warned him that he chose to have a lawyer present. When they got to the Justice of the Peace Court, the defendant asked that he still talk to the police officer and retract the exercise of that right.

The only thing that the State has to show is that the defendant was warned of his constitutional rights, that he understood them, and that he waived them. It is clear that he understood them from the fact that he exercised them the first time, and it is further clear that he wanted to waive them by the fact that he asked that he waive them. If it was the other way around, that he spoke and then wanted to exercise his constitutional rights, we certainly would let the statement in, if you waive it.

In this particular case, it is clear that he understood them and that he exercised them, and according to the testimony of Officer Griffith, he wanted to initiate a further conversation and withdraw the exercise of that right and wanted to make a statement, and the question is was there anything brought to bear upon him that caused him to change that decision to exercise his consitutional right to have a lawyer present. I cannot say that giving him lunch, informing him of the evidence and bringing him to the Justice of the Peace Court was such

overbearing tactics by the police that he was not exercising in free will. I am not in a position to say that at all.

As a matter of fact, it is just the opposite. He had further time for reflection. Based upon the testimony that has been offered on the statement presented to the Court, the Court will not suppress it on the grounds that the defendant did not waive his constitutional Miranda right.

Are we ready to proceed?

* *

MR. SANDY: The State is ready.

MR. HALLER: I am. Earlier this morning there was the reference to the fact that the alias John Fisher would not be used by the State.

MR. SANDY: I did not hear what you said.

MR. HALLER: Earlier this morning there was reference to the fact that the State was not going to use the name of John Fisher.

MR. SANDY: That is correct. We will excise that from the indictment, Your Honor, and just go on Percy Ewell Wainwright, also known as John Wainwright.

THE COURT: As a matter of fact, the clerk referred to that only in jury selection this morning.

MR. HALLER: All right, we are ready to proceed in

original twelve begin deliberations on the penalty phase or find a verdict of either not guilty or guilty of something less than murder in the first degree.

We will take a ten-minute recess and begin in the big courtroom in ten minutes.

(Whereupon, a brief recess was taken, at the conclusion of which the Court reconvened in open court and proceeded to hear testimony and Mr. Haller's argument on the Defendant's Motion to Suppress, which has previously been transcribed and is not being made a part of this record, after which the following proceedings were had:)

THE COURT: Mr. Sandy?

MR. SANDY: The most recent case on this issue, Oregon v. Bradshaw, decided on May 23rd of this year by the United States Supreme Court, was a case wherein a person had asked for an attorney and later reinitiated conversation with the police officers. In that particular case the person asked the police officer, "Well, what is going to happen to me now?," and in that particular case, just by asking that, the Supreme Court ruled that that was an initiation of further conversation. His statement showed a willingness and desire for generalized discussion about the investigation. It was not merely a necessary inquiry arising out of the incidence of the custodial relationship.

Your Honor, at this point, we have exactly that. Percy Lwell Wainwright wanted to talk to the police about his charges. That is perfectly clear by his request to retract his request for counsel. That shows a willingness to speak with the Delaware State Police about the charges against him.

Aside from that, we have shown that having then waived that right to counsel and saying, "I don't want an attorney now," we have shown that throughout the rest of it he was, in fact, aware of his rights for an attorney, to remain silent, and all the rest of his Miranda rights, and that he willingly gave a statement to the Delaware State Police.

THE COURT: Thank you.

(Whereupon, Mr. Haller presented rebuttal argument to the Court, which has previously been transcribed and is not being made a part of this record, after which the following proceedings were had:)

MR. SANDY: The Oregon trial was where a suspect cut off the custodial interrogation by invoking his right to an attorney, but then asked the interrogating officer, "What is going to happen to me now?" He engaged in several discussions with police officers over a two-day period and was twice re-warned of his rights prior to execution of a written waiver of rights, the taking of a polygraph examination, and the taking of a

confession.

(Thereupon, Mr. Haller presented further rebuttal argument to the Court and the Court rendered its opinion on the motion to suppress, which has previously been transcribed and is not being made a part of this record, after which the jury was called to the jury box and was duly sworn and the following proceedings were had in open court:)

THE COURT: Mr. Sandy, do you wish to make an opening statement?

MR. SANDY: Yes, Your Honor.

May it please the Court, Madam Forelady, ladies and gentlemen of the jury: This is the last chapter of the life of William S. Hastings. Mr. Hastings was a liquor store clerk who worked in Lord's Liquor Store in the fall of 1980. Lord's Liquor Store is the liquor store that is operated in the Town of Bridgeville near Route 404 where you turn off and head towards Baltimore and the Bay Bridge.

Ladies and gentlemen of the jury, on the night before Election Day, November 3, 1980, while he was working at that store, someone entered that store and killed him. He was shot at close range with a shotgun. You will hear Dr. Tobin come in, who did the autopsy, and testify about where he was shot, the number of shots and the shotgun pellets that were removed fro

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PERCY E. WAINWRIGHT, Defendant-below, Appellant,	)	
v.	)	No. 365, 1983
STATE OF DELAWARE, Appellee.	)	

ORDER

Before CHRISTIE, Chief Justice, McNEILLY, HORSEY, MOORE and WALSH, Justices, constituting the Court en banc.

This 12th day of December, 1985, appellee having filed on November 8, 1985, without leave of Court previously sought and following argument before the Court en banc, a document entitled "Motion to Remand for a Further Evidentiary Hearing and Findings" and

It being apparent that said document seeks to place before the Court factual material which was not part of the record of the proceedings in the Superior Court, contrary to Supreme Court Rule 9(a), and

It further appearing that said motion presumes a result in a matter now under advisement to the Court en banc

NOW, THEREFORE, IT IS ORDERED that the motion to remand is denied.

BY THE COURT

Andrew D. Christie
Chief Justice

A-52

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : Criminal Action No. 81-10-0084
: Criminal Action No. 81-10-0085
v. :
:
DAVID W. DODSON, :
: VOLUME III
Defendant. :

T R A N S C R I P T
O F
P R O C E E D I N G S

Judge's Chambers, Bailiffs' Office, and Courtroom
Sussex County Courthouse
Georgetown, Delaware
Wednesday, May 16, 1984

The above-entitled matter reconvened for further trial in open court at 9:47 o'clock a.m.

BEFORE:

HONORABLE CLAUD L. TEASE, Judge,

and a jury.

APPEARANCES:

JOHN M. SANDY, Deputy Attorney General, appearing on behalf of the State of Delaware.

T. HENLEY GRAVES, ESQ., appearing on behalf of the Defendant.

A I picked him up at S.C.I. and transported him back to Troop 4, Georgetown, which is the barrack I am stationed at. I took him back to what at that time was called the processing room, where he was processed.

Q What is processing?

A Processing is advising the defendant what he is being charged with, fingerprinting, photographing, taking his personal history, and also obtaining a statement from the defendant.

Q Did you tell the defendant that he was under arrest?

A Yes, sir, I did.

Q Did you, in fact, have a conversation with David Dodson that morning?

A Yes, sir, I did.

Q Prior to having that conversation, what, if anything, did you tell the defendant?

A I read him his Miranda rights from the Delaware State Police-issued Miranda card.

Q Do you have such a card with you today?

A Yes, sir, I do.

Q Would you please read for the Court what you read to Mr. Dodson that day?

A I read to Mr. Dodson,

"You have the right to remain silent. Anything

Q As I understand your testimony, you were performing a procedural requirement of the Delaware State Police in your performances on November 11th?

A Yes, sir.

Q And not as an officer assigned to the case?

A No, sir.

Q When did you become involved in the Laverty homicide as principal investigating officer?

A Somewhere -- I am not sure of the exact date -- in August of 1983.

Q That was how many months after this statement was allegedly taken?

A This was taken November of '82. Probably close to two years later.

Q So at the time that you took the alleged statement from Mr. Dodson, you were not the principal investigating officer on either one of these cases; is that correct?

A That's correct, sir.

Q What were your performances as a police officer up to that point in time? Were you assigned mostly to the road, to burglary, or to what?

A I was assigned to Crimes Against Persons: rapes, robbery, homicides.

Q How long had you been assigned to that?

A I was in the Youth Division up until, I believe, July of 1981, I think it was.

Q You were aware when you picked up Mr. Dodson on the 11th that he was under indictment by the Grand Jury for murder in the first degree from Sussex County; is that correct?

A Yes, sir. The warrants were Rule 9 warrants from the Grand Jury.

Q That is from the Superior Court, the court we are in right now; is that correct?

A Yes, sir.

Q At the time you said it was Delaware State procedure for an individual to be processed and questioned; is that correct?

A Yes, sir, it is.

Q Does the Delaware State procedure differ whether that defendant had just been arrested or is in a pre-indictment situation or is there a difference in the Delaware State procedure if it is a post-indictment processing?

A The only procedure I am aware of is when a person is processed on warrants, the questioning is standard operating procedure.

Q Does that continue to be the standard operating procedure for a post-indictment situation?

A I am not certain whether there is any difference at all.

Q You are not aware of any changes that have been made?

A When the subject is processed on warrants, then he is interviewed. That is initial contact between the police officer and the defendant when the warrants are processed.

Q I want you to recall, as best you can, the specifics exactly as they occurred, beginning with the time that you took Mr. Dodson from S.C.I. Would you relate to His Honor exactly what conversations took place?

A All right. I don't know the words verbatim. I can tell you the context of the statement.

Q I want to know from the beginning when you picked him up at S.C.I.--

A Yes, I did.

Q --was there any conversation between you and him from S.C.I. to the police barracks?

A If there was, it is nothing I can recall, other than the weather, or whatever. Nothing that I can recall pertaining to the case.

Q Would you pick up then what took place once you got into the Georgetown barracks?

A All right. He was placed in the processing room with

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID W. DODSON,	§	
	§	
Defendant-Appellant,	§	No. 158, 1984
	§	
v.	§	Court Below: Superior Court,
	§	Sussex County
STATE OF DELAWARE,	§	Cr.A. Nos. S81-10-0084 and
	§	0085
Plaintiff-Appellee.	§	

Submitted: March 25, 1986
Decided: June 13, 1986

Before CHRISTIE, Chief Justice, McNEILLY and HORSEY, Justices.

Upon appeal from Superior Court. REVERSED and REMANDED.

T. Henley Graves (Argued) of Fuqua and Graves, Georgetown, for Defendant-Appellant.

Gary A. Myers (Argued), Deputy Attorney General, Department of Justice, Georgetown, for Plaintiff-Appellee.

McNEILLY, Justice:

The defendant, David W. Dodson, was convicted following a jury trial in Sussex County of first degree felony murder and possession of a deadly weapon during the commission of a felony. When the jury refused to impose the death penalty, the defendant was sentenced to life imprisonment without probation or parole on the murder charge and to twenty years' imprisonment on the weapons charge. The charges stemmed from Dodson's participation in the 1986 attempted robbery of a Bridgeville liquor store and the murder of William Hastings, the liquor store clerk. A co-defendant, Percy Ewell Wainwright, was convicted of the same offenses in a separate trial and sentenced to life imprisonment, the State having declined to seek the death penalty. We recently reversed Wainwright's convictions, ruling that the police obtained certain oral statements from Wainwright in violation of his Fifth Amendment right to counsel. See Wainwright v. State, Del. Supr., 504 A.2d 1096 (1986).

Dodson argues on appeal that the police obtained an oral statement from him in violation of his Fifth Amendment right to remain silent under Miranda v. Arizona, 384 U.S. 436 (1966).[1] Because we conclude the trial court erred in permitting the introduction of defendant's statement, we reverse and remand for a new trial.

1. Because our disposition of this case turns on the defendant's right to remain silent, we need not address his other arguments. We do note, however, that the question of whether the analysis set forth in Edwards v. Arizona, 451 U.S. 477 (1981), applies to the Sixth Amendment right to counsel as well as to the same right under the Fifth Amendment, argued against by the State in supplemental briefing, has been laid to rest by the United States Supreme Court's decision in Michigan v. Jackson, 106 S.Ct. 1404 (1986). In that case, the Supreme Court held that although the bright-line rule established in Edwards rested on the Fifth Amendment, the reasoning of that case applies with even greater force to Sixth Amendment cases. Id. at 1411.

On October 26, 1981, a Sussex County grand jury indicted David Dodson for the murder of William Hastings during an attempted robbery of a Bridgeville liquor store the night of November 30, 1980.[2] Because Dodson was incarcerated in Maryland, the Delaware charges were lodged as detainers with the Maryland correctional authorities. On October 25, 1982, acting pursuant to the provisions of the Interstate Agreement on Detainers, the defendant notified the Delaware prosecutor that he wished to be tried on the outstanding murder charge.

Dodson was transported to the Sussex Correctional Institution in Georgetown, Delaware on November 10, 1982. The next morning, Delaware State Police Detective Griffith took him to the police barracks for processing prior to his arraignment.[3] At the barracks, the detective read the defendant his rights under Miranda. He informed him that he was being charged with the murder of William Hastings and that it would be better if he cooperated with the investigation. The defendant said he would make a statement, but not at that time.

The officer then began questioning Dodson about another homicide. After questioning the defendant for approximately 45 minutes, the officer advised him that he had given good informatior.

2. At the time of the killing, the defendant was an escapee from a Maryland prison, where he was serving the remainder of his term of imprisonment for a prior murder in Maryland. By the time he was indicted in Delaware, however, he had been recaptured by the Maryland authorities.

3. Processing includes notifying the individual of the charges against him, fingerprinting and photographing him, taking his personal history, and asking if he wishes to make a statement.

but that the police needed to know that he was telling the truth. At that point, the officer asked him if he wanted to talk about the Hastings homicide at that time. The defendant then implicated himself in the Hastings murder, telling the officer that he had acted as a lookout for the Bridgeville robbery, but that Percy Wainwright, Dodson's co-defendant, had entered the liquor store and killed the clerk. The Superior Court allowed the introduction of the statement at trial.

II

In Miranda, the United States Supreme Court set forth the procedure to be followed when a defendant invokes his right to remain silent or his right to counsel under the Fifth Amendent:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. ... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

384 U.S. at 473-74 (footnote omitted).

With regard to the Fifth Amendment right to counsel, the Supreme Court established a bright-line rule for determining compliance with Miranda in Edwards v. Arizona, 451 U.S. 477 (1981). See Wainwright, 504 A.2d at 1101. The Court ruled that once an

accused has expressed a desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards, 451 U.S. at 484-85.

In Smith v. Illinois, 105 S.Ct. 490 (1984), the Court clearly outlined the analysis required by the Edwards rule:

> First, courts must determine whether the accused actually invoked his right to counsel. ... Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

Id. at 493 (citations omitted).

The Supreme Court reaffirmed the requirement that the accused initiate further discussion in Oregon v. Bradshaw, 103 S.Ct. 2830 (1983): "[B]efore a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'" Id. at 2834 (quoting Wyrick v. Fields, 459 U.S. 42, 46 (1982)). This Court summarized the controlling principle with regard to initiation in Wainwright: "If the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver." 504 A.2d at 1102.

With regard to the Fifth Amendment right to remain silent, the Supreme Court, in Michigan v. Mosley, 423 U.S. 96 (1975), attempted to define the scope of the Miranda requirement that once

the person in custody indicates that he wishes to remain silent, the interrogation must cease. Determining under what circumstances questioning can be resumed once an accused invokes his right to remain silent, the Court ruled that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" Id. at 104 (footnote omitted). The Court found that Mosley's right had not been violated because the police immediately ceased the interrogation once he invoked his right, resumed questioning only after a significant period of time had passed and fresh warnings had been given, and restricted the second interrogation to a completely different crime. Id. at 106.

III

The right to remain silent is a constitutional right, subject to protection similar to the protection afforded the right to counsel. Consequently, when a defendant invokes his right to silence, the police may not initiate continued interrogation on the crimes at issue. Cf. Edwards, 451 U.S. at 484-85; Wainwright, 504 A.2d at 1102.

In this case, Detective Griffith directed the conversation with Dodson back to the Hastings murder after questioning him for 45 minutes about a separate homicide. By again questioning Dodson about the crimes for which he was charged after he had invoked his right to silence as to those charges in the same conversation 45 minutes earlier, the officer initiated interrogation on a subject he had a duty to avoid for the time being, thus violating the defendant's

Fifth Amendment right to remain silent. Under an Edwards-type analysis, the State was not free to reapproach the defendant for a statement as soon as it did in this case.

Moreover, analyzing this case under Mosley, it is clear that the officer did not scrupulously honor the defendant's right to cut off questioning. 423 U.S. at 104. As in Tucker v. State, Del. Supr., 411 A.2d 603 (1980), there was a "significant and unacceptable nexus" between the officer's continued questioning and Dodson's statement. Id. at 605. After the defendant declined to make a statement concerning the Hastings murder, Detective Griffith should not have directed the questioning back to that same subject in the same conversation only 45 minutes later, giving no fresh warnings. See Mosley, 423 U.S. at 106.

* * * *

REVERSED and REMANDED for a new trial.

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1105

September Term, 1985

CHRISTOPHER HOLMES CONOVER

v.

STATE OF MARYLAND

Bloom
Karwacki
Wenner,
JJ

PER CURIAM

Filed: April 2, 1986

On May 23, 1985, a jury in the Circuit Court for Baltimore County convicted appellant, Christopher Holmes Conover, of two counts of murder, one count of attempted murder, and one count each of assault with intent to murder, burglary, and use of a handgun in the commission of a crime of violence. The court sentenced him to two consecutive life terms for the murders, one concurrent life term for the attempted murder, thirty years concurrent for the aggravated assault, twenty years concurrent for the burglary, and ten years consecutive for the handgun violation. Conover filed a timely appeal.

During the trial, Linda Jordan testified that appellant and another white male knocked on her door and identified

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themselves as police. Once inside, the two men drew guns, handcuffed Mrs. Jordan, her husband, and Lisa Brown, Mrs. Jordan's daughter. The victims were forced to lie on the floor. The two men ransacked the house and then admitted a black male named Jones. Jones held a gun on the victims and stuffed gags into their mouths. Shortly thereafter Mrs. Jordan heard gunshots and saw that her daughter had been shot. Mrs. Jordan then saw Jones shoot Mr. Jordan in the back of the head. Jones then fired two shots into the back of Mrs. Jordan's head.

The perpetrators left and then, realizing that Mrs. Jordan was still alive, fired several shots through the sliding glass doors at the rear of her house, hitting her in the leg. Mrs. Jordan survived and managed to summon the police.

The State introduced a microscopic analysis which matched hair fibers found on Lisa Brown's body with appellant's hair. Appellant produced three witnesses who testified that he was attending a party about two miles away at about the time the crimes were committed.

Appellant presents four arguments: first, that the court erred in denying appellant's motion to suppress a statement made to the police; second, that the court erred in instructing the jury; third, that the court erroneously admitted hearsay evidence at appellant's sentencing hearing, and fourth, that the court erred in imposing more than one mandatory sentence without parole. We address the issues *in seriatim*.

I. Motion to Suppress

The record reflects that appellant was properly arrested and read his rights consistent with the directives of *Miranda v. Arizona*, 384 U.S. 436 (1966). At police headquarters appellant was again read his *Miranda* rights and was then interviewed by Detective Long, another detective, and an agent from the Federal Bureau of Investigation. Appellant immediately requested an attorney, at which time Detective Long ceased asking questions.

At trial, Detective Long testified that after appellant's request he told appellant an attorney would be provided. Appellant was not asked any more questions. Instead, the detectives "reviewed" with appellant the charging documents filed against him. These documents were part of a "packet" which included the application for the charging document. The application described much of the evidence against appellant and stated that a .38 caliber pistol had been used in the shootings.

After reviewing this information, appellant, according to Detective Long, began speaking in hypotheticals and asking questions described by Detective Long as "suppose this, suppose that, what if?" Appellant then, apparently without prompting, suddenly stated, "You can't put me with that 38." The entire interview lasted about fifteen minutes. The court refused to suppress the statement, and the State introduced it and referred to it in argument.

Appellant now argues that once he requested an attorney all interrogation should have stopped. He insists that the "review" of the charging documents and evidence constituted continued interrogation and that admission of

statements made thereafter was prejudicial and reversible error. We agree.

On cross-examination, appellant's attorney elicited from Detective Long the details of the "review" of the charging documents. The relevant points are as follows:

(a) Detective Long testified that the documents were read to appellant and then handed to him. Detective Long said he reviewed the documents with appellant by "[h]anding him a charging document and telling him why he's there, why he's being arrested, what he's being arrested for and here is [sic] the charging documents used against you. Read them, look at them, if you have any questions ask them."

(b) The following colloquy occurred between defense counsel and Detective Long:

Q. It seemed to me that during the course of your direct examination you had said that after the Miranda warnings were given he started talking, is that correct, immediately?

A. He just started talking, yes.

Q. He just started talking. Did anybody suggest anything to him about what the evidence was against him?

A. No.

Q. Nobody said that there had been a positive ID made on you and your brother and that there was a .38 clip found in the apartment?

A. The only evidence that was presented to him at the time was the evidence that was stated in the probable cause and for the application for the statement of charges.

Q. Well, you had that at that point, didn't you?

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A. Yes. We had the charging document itself so he would have the whole packet, which he could have reviewed.

Q. But that wasn't suggested to him?

A. No, sir.

(c) Finally, the court asked, "Did you [Detective Long] make any statement at all after he [appellant] said he wanted a lawyer to prompt him to make any more comments?" "No, sir, Your Honor" was the answer.

The question we must now answer is whether this "review" of the charging documents amounted to an interrogation in violation of appellant's rights. We need not belabor that question, for one almost identical to it was answered quite recently in *State v. Quinn*, 64 Md. App. 668 (1985). In that case, the investigating officer gave the defendant a copy of the "Statement of Charges" which included an application for the statement of charges, a form from the district court. Chief Judge Gilbert settled the matter presented in *Quinn* and here when he wrote for the court:

> When the trooper handed the application to Quinn [defendant below] to read, it was the same as if he had said to Quinn, "Look and see for yourself what I have against you. Now what do you have to say"? We believe . . . that the trooper's actions were deliberately designed to circumvent *Miranda* and *Edwards* [v. *Arizona*, 451 U.S. 477 (1981)]. What the trooper did was innovative; it was also impermissible. We repeat what we said in *Bryant* [v. *State*, 49 Md. App. 272, *cert. denied*, 291 Md. 772 (1981), *cert. denied*, 456 U.S. 949 (1982)]:

> "[O]nce the right to the presence of counsel has been made by the accused, arrestee, or suspect, any attempt by the authorities to 'spark' the accused's 'own initiative' will contaminate the waiver and render it a nullity."

49 Md. App. at 280, 431 A.2d at 718.

There are no "short cuts" to *Miranda* compliance. *Id.* at 674. We see no difference between *Quinn* and the case *sub judice*, and we accordingly hold that the police violated appellant's rights under *Miranda* by presenting him with the charging documents, including the application for the statement of charges, after he had requested an attorney. The statement elicited thereby was thus inadmissible and should have been suppressed.

We also hold that the error was prejudicial and thus requires reversal. The standard of review applicable here was set forth in *Dorsey v. State* wherein the Court of Appeals said that "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error *in no way* influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated." 276 Md. 638, 659 (1976) (emphasis added).

We cannot say, beyond a reasonable doubt, that the appellant's outburst that "[y]ou can't put me with that .38" in no way influenced the jury. While there was unquestionably a great deal of evidence against appellant, there was not so much as to overwhelm the impact of the statement or render it insignificant. It is true that Mrs. Jordan identified appellant as one of the assailants. It is also true that three unimpeached witnesses placed him at a party almost two miles away. It is true that a micro-

scopic test of hair fibers found on Lisa Brown's body matched appellant's own hair, yet the analyst admitted that such comparisons, while good, are not as reliable or conclusive as fingerprints.

Finally, if the statement was not prejudicial, as the State contends, why, we ask, was it even used? We are hard pressed to believe that the State would fight an objection over admission of the statement in evidence unless the statement helped its case. Although the statement is seemingly exculpatory on its face, it has a connotation that suggests involvement in the crime that appellant is confident cannot be proved. Why offer it otherwise?

II. Erroneous Instructions

Appellant alleges error by the court below in two instances. First, appellant attacks the court's comment that "[t]he defendant does have the burden of proving his innocence or producing any evidence." Second, appellant contends the court erred in giving instructions on alibi when it said, "When such a claim [alibi] is thoroughly established, it precludes the possibility of guilt."

The first instruction clearly seems to be either a slip of the tongue by the court or an omission by the reporter in transcribing the proceedings. (The State, by motion to this court, supplemented the record with an affidavit of the court reporter in which she swore that the error was hers and that the instruction should have read "the defendant does *not* have the burden" of proof.) In either case, the error was obviously an accidental one, not likely to be repeated in the event of a retrial; and since we are reversing the convictions as explained above, we see no need to address this issue further.

Likewise, the second instruction illustrates a mere poor choice of words, not a misunderstanding of the applicable law. This error, too, was accidental and unlikely to be repeated. We need not address it here.

III. Hearsay Evidence

At the sentencing hearing, the court permitted the State to introduce four types of documents, to-wit: commitment records of the Department of Corrections, commitment records of the Circuit Court for Baltimore County, docket entries, and charging documents. Appellant objects that these documents contained hearsay information and should have been excluded. We disagree. The commitment records, docket entries, and charging documents of the circuit court were certified as true copies by the clerk of the court. They were thus admissible under Md. Cts. & Jud. Proc. Code Ann. § 10-204 (1984). The other documents merely duplicated the information provided by the circuit court documents. We find no error in admitting to any of them.

IV. Mandatory Sentences

The State agrees with appellant, as indeed it must, that the court erred in imposing two mandatory sentences pursuant to Md. Ann. Code art. 27, § 643B. This is clearly prohibited by *Calhoun v. State*, 46 Md. App. 478 (1980), *aff'd* 290 Md. 1 (1981).

JUDGMENTS REVERSED

COSTS TO BE PAID BY BALTIMORE COUNTY.

Supreme Court, U.S.
FILED
SEP 16 1986
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No. 85-1928

In The
Supreme Court of the United States
October Term, 1985

STATE OF DELAWARE,
Petitioner,

v.

PERCY E. WAINWRIGHT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DELAWARE SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In this petition, the State of Delaware asks this Court to determine what constraints *Miranda* imposes upon the police practice of telling a suspect the evidentiary basis for his arrest.

A. The Legal Issue

1. Respondent does not argue that the interplay between disclosure of evidence and "interrogation" under *Miranda* is not an important issue. Indeed, respondent suggests that the question should be broadened. He asserts that *Edwards v. Arizona,* 451 U.S. 477 (1981) overruled *Rhode Island v. Innis,* 446 U.S. 291 (1980). According to him, the permissibility of police conduct after the

suspect has requested an attorney is to be measured, not by the *Innis* definition of "interrogation," but rather an inquiry whether the conduct was police "initiated" contact. Br. in Opp. at 22-23.[1]

2. Most importantly, the courts continue to struggle with applying the *Innis* definition of interrogation to police practices of informing the suspect of the evidentiary basis for his arrest. Since the opinion below, Nevada has chosen to follow the approach of requiring a case-by-case appraisal of the supposedly "evocative" nature of the disclosure. *Koza v. State*, 718 P.2d 671, 674-75 (Nev. 1986). However, the Maryland Court of Appeals has decided to review the decision in *State v. Conover* (reproduced at Pet. App. 22), the latest in a line of Maryland intermediate appellate court opinions relied upon by the Delaware Supreme Court in this case. *State v. Conover*, 509 A.2d 1201 (Md. June 10, 1986) (granting pet. for cert.).

In contrast, Texas has taken the view, under a state statute implementing *Miranda*, that responses prompted by the delivery of a capital murder indictment to a suspect are not the products of impermissible interrogation. *East v. State*, 702 S.W.2d 606, 613-14 (Tex. Crim. App. 1985). *See also State v. Taylor*, 490 So.2d 459, 460 (La. App. 1986) (after suspect invoked right of silence, explanation of what investigation would entail not impermissible interrogation).

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[1]The Delaware Supreme Court seemingly accepted this view. Pet. App. at 12. If accepted, it would have broad ramifications. Police requests to a suspect for fingerprints, for participation in a line-up, or for cooperation in other investigative techniques would, because they did not involve routine incidents of the custodial relationship, constitute impermissible "initiation."

3. Indeed, respondent's efforts to explain the opinion below, while distinguishing other cases, support the grant of review in this case. Echoing the position adopted by the court below, he argues that the permissibility of disclosing evidentiary information to the suspect, even if it furthers other important interests, is governed by an "evocative" switch—the conduct is impermissible if the facts disclosed are "evocative," but permissible if the facts are "innocuous." Not only does such a test break down in application, but it puts the police in the quandary of attempting to determine which facts, all sufficiently accusatory to justify the suspect's arrest, are "evocative" and which are merely "neutral." Thus, he suggests that the police may inform the suspect of the charge against him, so long as they apparently merely name the crime and do not mention any facts surrounding the cause for the arrest. Br. in Opp. at 15. But this effort to draw the "evocative" line between "charge" and "underlying evidence" has little basis in common sense. Unless this Court is willing to assume that all suspects have a working knowledge of the legal rules of felony-murder and accomplice liability, a recital to a suspect that he is charged with the robbery of a liquor store and the murder of the store clerk is just as likely to draw a response from the lookout that "he didn't kill the man" as any disclosure of a co-defendant's statement.

Indeed, respondent's efforts to distinguish *State v. Williams,* 333 S.E.2d 708, 717 (N.C. 1985) highlight the problems of this ad hoc approach. Besides his own conclusion that the delivery of search inventory returns is a procedure generally less "evocative" than disclosure of the evidentiary basis for arrest, Br. in Opp. at 24 n. 14,

respondent cannot explain how the police are to know that reiterating to the suspect their discovery of the murder weapon in the suspect's car is "innocuous" while informing him truthfully of his co-defendant's implicating statement is "evocative."

Respondent also suggests that the interests supporting disclosure of the basis for a suspect's arrest can be satisfied by providing the information only if the suspect asks for it. Br. in Opp. at 18. But that is not an adequate answer. First, according to the respondent's view, the police in that situation would have to preface any response with an additional set of *Miranda* warnings.[2] Br. in Opp. at 9. Moreover, because under the Delaware rule such factual information constitutes interrogation, a defendant would be required to waive his rights under *Miranda* as a condition to receiving information as basic as the factual predicate for his arrest. Respondent's analysis thus places *Edwards* on its head by making waiver the price for information.

4. Finally, the dilemma created by the opinion below when juxtaposed against holdings such as the one in *People v. Spring*, 713 P.2d 865 (Colo. 1985), *cert. granted*, 106 S.Ct. 1961 (1986) (No. 85-1517) is not an imagined one. Recently in *People v. Longoria*, 717 P.2d 497, 501 (Colo. 1986), the Colorado Supreme Court found that the suspect had made an intelligent waiver under *Miranda* when the police, during questioning, changed the subject of the interrogation from a rape to a robbery. The court found

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[2]Most likely, the suspect, having just asked for an attorney, would repeat that request. The police would then have to decline to answer the suspect's question. This police "refusal" to answer such a simple question would undoubtedly increase rather than decrease the suspect's anxieties.

that its ruling in *Spring* had not been violated only because the police, before beginning their questioning concerning the robbery, had informed the suspect of the nature of the new crime under investigation and outlined the evidence they had obtained which formed the basis for their accusations. 717 P.2d at 501. In contrast, a dissenting justice suggested that the validity of the waiver was subject to question because the disclosure of the evidence constituted impermissible pre-waiver "interrogation" under *Innis*. 717 P.2d at 503 n. 3 (Lohr, J., dissenting). Only this Court can clearly tell the police whether in fact they are caught between a rock and a hard spot.

B. The Factual Record

In his main thrust, respondent argues that although the issue may be important, this petition should be denied because the factual record does not support petitioner's legal position. However, when all of respondent's hyperbole is removed, the essential facts are not really subject to question. The police officer testified, without contradiction, that as part of a policy to provide such a disclosure to all arrest suspects, he told the respondent of the nature of the charge and the basis for his arrest for purposes of information. Tr. I8, 16-17, 21, 26 (Br. in Opp. App. A26, A34-35, A39, A44). The trial court in its findings never questioned the veracity of that testimony.

If, as respondent proposes, the "facts" have been muddied on appeal, the supposedly murky waters result solely from respondent's own thrashings. At the suppression hearing, respondent made the legal, and indeed factual, concession that his original remark to the detective in the parking lot outside the local courthouse was "spon-

taneous." Tr. I26-27 (Br. in Opp. App. A44-45). As the Delaware Supreme Court noted, that concession probably prompted the trial court not to undertake an inquiry into the first prong of any waiver analysis under *Edwards*. Pet. App. 9. When that motion was denied, respondent, represented by counsel chose to take the stand at trial. He then repeated to the jury the same story that he told the officer, offering that his participation in the robbery was coerced. When that explanation failed to sway the jury,[3] respondent then took a drastically different tack in his third bite at the apple of avoiding criminal liability. Suggesting to the Delaware Supreme Court that his previous concession of "spontaneity" had been wrong, he argued that his statements were the product of impermissible police coercion. However, rather than accede to the prosecution's request for a remand for further evidentiary development on this "interrogation" issue which he had now introduced, he successfully urged the Delaware Supreme Court to apply the plain error rule to a factual record developed in light of a concession he now viewed as clearly erroneous. The haze he now asserts as precluding review is a product of his own doing when he abandoned on appeal his evidentiary concession and objected to any attempt to fill the void that concession had

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[3]Although under this Court's opinion in *Harrison v. United States*, 392 U.S. 219 (1968), it appears that respondent's in-court testimony cannot legally render the *Miranda* violation harmless, his voluntary choice made with the advice of counsel to repeat, in court, the same story he gave to the police officer supports his concession during the suppression hearing that his statement was "spontaneous." *Cf. Oregon v. Elstad*, 105 S.Ct. 1285 (1985) (although initial statement was taken in violation of *Miranda*, subsequent statement which is voluntary under the totality of the circumstances is nonetheless admissible).

originally created. He should not now be permitted to utilize the haze he created to obscure the legal issue presented here.[4]

Respectfully submitted,

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[4]This Court obviously cannot interpret the application of the Delaware "plain error" doctrine. However, nothing in *Miranda* nor the concept of federalism require this Court to decline review in this case when the trial court record is uncontradicted and the legal issue important.